

A TREATISE
ON THE
LAW OF
PUBLIC UTILITIES

INCLUDING
MOTOR VEHICLE TRANSPORTATION
AIRPORTS AND RADIO SERVICE

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§ 355. Equipment of municipal public utilities in highways.

—The courts are not agreed as to whether an additional servitude or burden is imposed upon the abutting property owners

by placing the equipment of municipal public utility plants in the streets or other highways. In different jurisdictions the courts have taken diametrically opposite positions in determining whether the installation of poles, wires, pipe lines and tracks along the streets or highways amounts to such a taking or damaging of the property of the abutting owner as to entitle him to compensation under the constitution for the reason that a servitude is created in addition to those contemplated or included in the original grant or dedication for the use of the public. The courts are agreed that by the exercise of the right of eminent domain the municipal public utility may acquire such rights in the streets and highways which would permit the installation and operation of its plant for the purpose of furnishing its service because the use is a public one. The controversy, however, arises in determining whether, within the constitutional provision prohibiting the taking or damaging of property for public use without just compensation to the owner, the municipal public utility may install its system and use the streets and highways without payment to the owner of the abutting property.

§ 356. **Public purposes for which highways dedicated.**—The determination of this question by the courts in diametrically opposite ways results from their different definitions of what is included in the "public purposes" for which the streets and highways are dedicated. Those courts, holding that the purposes covered by the dedication are only the right of the public actually to pass over and along the territory included within the limits of the street or highway in the exercise of their rights of locomotion and transportation in a physical, tangible manner, decided that the installation of poles, wires, and pipe lines for the transportation of heat, light and the communication of intelligence by wire constitutes an additional servitude or burden for which, under the constitutional guaranty, the abutting property owner is entitled to be compensated. This is the conservative position which is taken by several jurisdictions of well-recognized authority and is based on a strict literal definition of the purposes and uses for which the streets and highways are dedicated.

§ 357. **Purposes include communication and transportation.**—The increasing weight of authority, however, and it would seem the more progressive reasoning of the remaining jurisdictions, define the purposes for which the streets and highways are dedicated so as to comprehend not only those actually in the minds of the parties at the time of the dedication and for actual

physical travel and transportation, but extend the rule by holding that, on acquiring the use of the streets and highways for public purposes and in the payment made to the abutting property owner, the public has the right to use the territory thus acquired in any manner and for any purpose necessary for its travel and transportation as well as for the additional purposes of communication and of furnishing the public with the conveniences of public utilities as afforded by modern invention; thereby permitting more of the public to have and enjoy the benefits and advantages of municipal public utilities as they may be or become available, as well as our present day motor vehicles, which have revolutionized travel and transportation.

§ 358. **Purposes not limited to those contemplated at dedication.**—These courts refuse to be limited to the purposes originally contemplated at the dedication or to admit that locomotion is the only use intended to be made of the streets and highways, but insist that such uses include any and all improved methods for the transmission of intelligence as well as for actual travel, for which the messages sent by wire serve as a substitute with the net result of very materially relieving the actual travel and transportation in the streets and highways. For the reason therefore that any such additional uses which take advantage of new methods that may be devised or invented for transportation or communication are properly included in the dedication of the streets or highways to the public use, for all of which the abutting property owner receives payment at the time of the dedication, and for the further reason that the substitution of such improved methods of communication as the telegraph or telephone as well as the enjoyment of any other modern municipal public utility service actually relieves the streets and highways from traffic and materially increases and makes more available the advantages of living in our present-day municipalities, the increasing weight of authority refuses to find that an additional servitude is created by virtue of the installation of the necessary equipment for the operation of these municipal public utility systems.

§ 359. **Equipment for local service no additional servitude.**—In determining for what uses the streets and highways are dedicated to the public with the view of deciding whether an additional servitude is created by the installation of any particular municipal public utility, one of the most important factors is the nature and extent of the service rendered or the locality served.

Where the service rendered is entirely, or for the most part, local so that the adjoining property owners and other inhabitants living adjacent to the street or highway constitute the class or the majority of the customers served, the courts for that reason are inclined to hold that no additional servitude or burden is imposed by the installation of the equipment necessary to render such service.

§ 360. **Street railways and pipe lines local, not additional servitudes.**—Under this distinction, as will appear in a number of the cases hereafter noted for the purpose of discussing this principle of additional servitudes, the courts have generally refused to find that the operation of a street railway system rendering local service or the laying of pipe lines for the purpose of providing municipal public utility service to the inhabitants of the municipality creates any additional servitude or burden; and that the adjoining property owner can only recover for any special damages actually sustained by him as distinguished from other neighboring property owners. For the reason that the purpose is public and the equipment is necessary to furnish the desired service, the courts refuse to hold that the installation of such equipment as may be required to furnish a lighting system for the purpose of lighting the streets and highways is an additional servitude, although several hold that, where the service is provided for private purposes, an additional servitude is created for which the abutting property owner is entitled to be compensated.

§ 361. **Interurban railway system.**—The interurban system of transportation necessitates making the distinction between local service and foreign or nonresident service with the effect in the more conservative jurisdictions that the installation of such a system is held to constitute an additional servitude for the reason that the service rendered is not primarily, or for the most part, local. An increasing number of courts of the more progressive jurisdictions, however, insist that no additional servitude is created in the use of the street or highway by the interurban system for the reason that the dedication was not merely for local use, but that the system of highways, including the streets, is under the control of the state and is dedicated for the general use of all the people of the state; that the establishing of better facilities of communication between the urban and rural population is for their mutual advantage and that, as they together constitute the public for whose use and general wel-

fare highways are dedicated and communication established, the use is not merely local but general in scope. But as the steam railway provides almost exclusively for through rather than local traffic and also creates a more serious burden and exclusive use of the land which it occupies, the courts agree in holding that such a user constitutes an additional servitude.

§ 362. Tendency to extend municipal utility service.—For the reason that the street as well as the interurban electric system facilitates travel and because the telephone and telegraph system facilitates communication by wire, thereby dispensing with the necessity of travel, and because it is desirable that such other municipal public utility plants as furnish water, heat and light be placed within the reach of all, the tendency of the authorities seems to be to encourage the extension of these conveniences not only to the inhabitants of the municipality but also to the rural population by defining the term "public use," for which the highway is dedicated, so comprehensively as to permit of the installation of the different systems furnishing these utilities without any payment as for an additional servitude.

§ 363. Streets and other highways not distinguished.—Other authorities, however, still require payment to be made for such uses of the highway on the theory that they do constitute additional servitudes that were not contemplated at the time of the dedication or fairly included within the purposes of the dedication. The distinction which was formerly made between the street and the rural highway as to the uses for which they were respectively dedicated no longer obtains as a general principle, and some of the leading cases which find that the installation of the equipment necessary to furnish the public utility service constitutes an additional servitude admit that there is no reason for distinguishing between the municipal and the rural highway. Nor is the distinction now recognized which formerly obtained between the use of the street where the fee is in the municipality and where it remains in the abutting property owner because the ownership of the fee does not change or necessarily affect the purposes for which the streets or highways are dedicated.

§ 364. Expedient to encourage extensions.—Finally as our general highway system is provided and controlled by the state in the general interest and for the benefit of its population at large for the purpose of transportation and communication, it would seem that from a practical standpoint any reasonable use

of the highway should be permitted which is public in its nature and has for its purpose the extension of one or more of the modern conveniences afforded by municipal public utilities to the public or a larger part of it, and, as it is to the general interest of the public that these conveniences be extended, public policy or the general welfare would justify the courts in holding that not only is no additional servitude thereby created, but rather that additional facilities are afforded to the abutting property owner and the public, except in those cases where there is no local benefit or advantage to the abutting property owner because the service is not local; in which cases because of such fact the courts very properly find that an additional servitude is imposed for which compensation should be made.

§ 365. **Decisions conflicting.**—However, as before stated, the authorities are by no means agreed as to what constitutes an additional servitude in connection with the establishment and operation of municipal public utilities, and because of this conflict in the authorities they are referred to and discussed at length for the purpose of indicating and explaining as far as possible the attitude of the different courts on this important phase of the law and its practical application concerning municipal public utilities.¹

¹ **Federal.** Pacific Postal Tel. Cable Co. v. Irvine, 49 Fed. 113; Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190; Kester v. Western Union Tel. Co., 108 Fed. 926.

Alabama. Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 19 So. 1, 31 L. R. A. 193, 55 Am. St. 930; Hobbs v. Long Distance Tel. & T. Co., 147 Ala. 393, 41 So. 1003, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461; Birmingham R. Light & C. Co. v. Smyer, 181 Ala. 121, 61 So. 354, 47 L. R. A. (N. S.) 597, Ann. Cas. 1915C, 863; Cloverdale Homes v. Cloverdale, 182 Ala. 419, 62 So. 712, 47 L. R. A. (N. S.) 607; Wiggins v. Alabama Power Co., 214 Ala. 160, 107 So. 85; Crawford v. Alabama Power Co., 221 Ala. 236, 128 So. 454.

California. Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185; Anderson v. Southern California Edison Co., 77 Cal. 328, 246 Pac. 559.

Colorado. Moffat v. Denver, 57 Colo. 473, 143 Pac. 577.

Illinois. Board of Trade Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453; Postal Tel. Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722, 62 Am. St. 390; Carpenter v. Capital Elec. Co., 178 Ill. 29, 52 N. E. 973, 43 L. R. A. 645, 69 Am. St. 286; McWethy v. Aurora Elec. Light & C. Co., 202 Ill. 218, 67 N. E. 9; Burrall v. American Tel. & T. Co., 224 Ill. 266, 79 N. E. 705, 8 L. R. A. (N. S.) 1091.

Indiana. Eichels v. Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Kincaid v. Indianapolis Nat. Gas Co., 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602, 19 Am. St. 113; Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. 358; Coburn v. New Tel. Co., 156 Ind. 90, 59 N. E. 324, 52 L. R. A. 671; Mordhurst v. Ft. Wayne & C. Trac. Co., 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. 222; Kinsey v.

Union Trac. Co., 169 Ind. 563, 81 N. E. 922; Pittsburgh, C., C. & St. L. R. Co. v. Muncie & C. Trac. Co., 174 Ind. 167, 91 N. E. 600; Chicago Lake Shore & C. R. Co. v. Guilfoyle, 198 Ind. 9, 152 N. E. 167.

Iowa. Anhalt v. Waterloo, C. F. & C. R. Co., 166 Iowa 479, 147 N. W. 928.

Kansas. McCann v. Johnson County Tel. Co., 69 Kans. 212, 76 Pac. 870.

Kentucky. Cumberland Tel. & T. Co. v. Avritt, 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955; Jefferson v. Louisville & C. R. Co., 155 Ky. 810, 160 S. W. 502; Citizens Tel. Co. v. Cincinnati N. O. & C. R. Co., 192 Ky. 399, 233 S. W. 901, 18 A. L. R. 615; Russell v. Kentucky Utilities Co., 231 Ky. 820, 22 S. W. (2d) 289, P. U. R. 1930B, 400.

Louisiana. Irwin v. Great Southern Tel. Co., 37 La. Ann. 63.

Maryland. American Tel. & T. Co. v. Smith, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; Chesapeake & C. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. 219; Chesapeake & Potomac Tel. Co. v. Tyson, 160 Md. 298, 153 Atl. 271; West v. Maryland Gas Transmission Corp. (Md.), 159 Atl. 758.

Massachusetts. Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; New England Tel. & T. Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835; Sears v. Crocker, 184 Mass. 586, 69 N. E. 327, 100 Am. St. 577; Cheney v. Barker, 198 Mass. 356, 84 N. E. 492, 16 L. R. A. (N. S.) 436; Towne v. Wenham, 267 Mass. 343, 166 N. E. 739.

Michigan. People v. Eaton, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721.

Minnesota. Cater v. Northwestern Tel. Exchange Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. 543.

Mississippi. Stowers v. Postal Tel. Cable Co., 68 Miss. 559, 9 So. 356, 12 L. R. A. 864, 24 Am. St. 290; Gulf Coast Ice Mfg. Co. v. Bowers, 80 Miss. 570, 32 So. 113.

Missouri. Julia Bldg. Assn. v.

Bell Tel. Co., 88 Mo. 258, 57 Am. Rep. 398.

Montana. Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102, 29 Pac. 883; Loeber v. Butte General Elec. Co., 16 Mont. 1, 39 Pac. 912, 50 Am. St. 468.

Nebraska. Jaynes v. Railroad Co., 53 Nebr. 631, 74 N. W. 67, 39 L. R. A. 751; Bronson v. Albion Tel. Co., 67 Nebr. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 639.

New Jersey. Broome v. New York & C. Tel. Co., 42 N. J. Eq. 141, 7 Atl. 851; Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Andreas v. Gas & Electric Co., 61 N. J. Eq. 69, 47 Atl. 555; Taylor v. Public Service Corp., 75 N. J. Eq. 371, 73 Atl. 118; Thropp v. Public Service Elec. Co., 83 N. J. Eq. 564, 91 Atl. 318; Nicoll v. New York & C. Tel. Co., 62 N. J. L. 733, 42 Atl. 583, 72 Am. St. 666; French v. Robb, 67 N. J. L. 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. 433; Laurel Garden Corp. v. New Jersey Bell Tel. Co. (N. J.), 160 Atl. 549.

New York. Eels v. American Tel. & T. Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; Palmer v. Larchmont Elec. Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672; In re Board of Rapid Transit Comrs., 197 N. Y. 81, 90 N. E. 456, 36 L. R. A. (N. S.) 647, 18 Ann. Cas. 366; Rasch v. Nassau Elec. R. Co., 198 N. Y. 385, 91 N. E. 785, 36 L. R. A. (N. S.) 645; In re New Street of New York, 215 N. Y. 109, 109 N. E. 104, L. R. A. 1916A, 1290, Ann. Cas. 1917A, 119; Metropolitan Tel. & T. Co. v. Colwell Lead Co., 67 How. Pr. (N. Y.) 365; Johnson v. Thomson-Houston Elec. Co., 54 Hun (N. Y.) 469, 7 N. Y. S. 716.

North Carolina. Smith v. Goldsboro, 121 N. Car. 350, 28 S. E. 479.

North Dakota. Donovan v. Alkert, 11 N. Dak. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. 720; Cosgriff v. Tri-State Tel. & T. Co., 15 N. Dak. 210, 107 N. W. 525, 5 L. R. A. (N. S.) 1142.

Ohio. Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724,

§ 366. **Communication by wire in lieu of travel.**—Many decisions hold that no additional servitude is created by the installation of the equipment of poles and wires necessary in the communication of intelligence by wire for the reason that the highway is dedicated for the purpose of transportation and conveyance of passengers and property and also for the transmission of intelligence, and that communication either by travel or message in lieu thereof is a proper use of the highway because both are public and the object to be accomplished in either is identical, the only ground of distinction being the method by which the object is accomplished. A number of the courts therefore almost from the very beginning of the use of the telegraph and telephone have held that this did not constitute an additional servitude on the highway, but that it was merely a better and more modern method of communication, the use of which in the public interest should be extended and encouraged and not handicapped by a payment as for an additional servitude for permission to install the necessary equipment. The Supreme Court of Massachusetts as early as 1883 in the case of *Pierce v.*

46 Am. St. 578; *Callen v. Columbus Edison Elec. Light Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; *Schaaf v. Cleveland, M. & S. R. Co.*, 66 Ohio St. 215, 64 N. E. 145; *Smith v. Central Power Co.*, 103 Ohio St. 681, 137 N. E. 159.

Pennsylvania. *Lockhart v. Craig St. R. Co.*, 139 Pa. 419, 21 Atl. 26; *Brown v. Radnor Tp. Elec. Light Co.*, 208 Pa. 453, 57 Atl. 904; *York Tel. Co. v. Keesey*, 5 Pa. Dist. R. 366.

Rhode Island. *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205.

South Dakota. *Kirby v. Citizens Tel. Co.*, 17 S. Dak. 362, 97 N. W. 3, 2 Ann. Cas. 152.

Tennessee. *Frazier v. East Tennessee Tel. Co.*, 115 Tenn. 416, 90 S. W. 620, 3 L. R. A. (N. S.) 323, 112 Am. St. 856, 5 Ann. Cas. 838.

Texas. *Jones v. Dallas R. Co.* (Tex. Civ. App.), 224 S. W. 807; *Dallas v. Couchman* (Tex. Civ. App.), 249 S. W. 234; *Malott v. Brownsville* (Tex. Civ. App.), 292 S. W. 606; *Tribble v. Dallas R. & Co.* (Tex. Civ. App.), 13 S. W. (2d) 933.

Vermont. *Burlington Light & Co. v. Burlington*, 93 Vt. 27, 106 Atl. 513.

Virginia. *Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 106, 8 L. R. A. 429, 19 Am. St. 908; *Wagner v. Bristol Belt Line R. Co.*, 108 Va. 594, 62 S. E. 391, 25 L. R. A. (N. S.) 1278.

Washington. *Spokane v. Colby*, 16 Wash. 610, 48 Pac. 248; *Phillippay v. Pacific Power & Co.*, 120 Wash. 581, 207 Pac. 957, 211 Pac. 872, 23 A. L. R. 1251, P. U. R. 1923C, 247.

West Virginia. *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410; *Fox v. Hinton*, 84 W. Va. 239, 99 S. E. 478; *Karcher v. Wheeling Electrical Co.*, 94 W. Va. 278, 118 S. E. 154, 30 A. L. R. 1044.

Wisconsin. *Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298; *Milwaukee v. Milwaukee Elec. R. & Co.*, 173 Wis. 400, 180 N. W. 339, 13 A. L. R. 802, mod. in 173 Wis. 411, 181 N. W. 821, P. U. R. 1922E, 444.

Drew, 136 Mass. 75, 49 Am. Rep. 7, which has since become a leading one, enunciated this principle concerning the law of municipal public utilities and gave it application in this connection for the practical reason, as the court said, that: "When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or transmission of intelligence. * * *

The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. It is a newly-discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out.

* * * We are therefore of opinion that the use of a portion of a highway for the public use of companies organized under the laws of the state for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the legislature, is a public use similar to that for which the highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation."

§ 367. **Public use not additional servitude.**—Twenty years later this same court in the case of *New England Tel. & T. Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835, reiterated this principle and extended its application to practically all municipal public utilities including those installed beneath the surface of the ground as well as those above or upon its surface. In holding that full payment is made to the abutting property owner at the time the street is dedicated covering practically all public uses to which it may be subjected in connection with the operation of any municipal public utility available at the time of such dedication or which may be invented in the future, the court said: "In this commonwealth, on the laying out and construction of a highway or public street, the fee of the land remains in the landowner, and the public acquire an easement in the street for travel. This easement is held to include every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the use of a public street. It includes the use of all kinds of vehicles which can be introduced with a reasonable regard for

the safety and convenience of the public, and every reasonable means of transportation, transmission, and movement beneath the surface of the ground, as well as upon or above it. Accordingly it has been held that the public easement which is paid for in assessing damages to the owner includes the use of the street for horse cars and electric cars, for wires of telegraph, telephone, and electric lighting companies, and for water pipes, gas pipes, sewers, and such other similar arrangements for communication or transportation as further invention may make desirable."

One of the most comprehensive definitions of "public purposes" for which streets may be used without payment as for additional servitudes is furnished in the case of *Fox v. Hinton*, 84 W. Va. 239, 99 S. E. 478: "It may be said that in this state, upon the acquisition of a public street, the fee of the land remains in the landowner, and the public acquires an easement in the street for travel. What does this easement include? It embraces every kind of travel and communication for the movement or transportation of persons or property which is reasonable, and further it includes the use of all kinds of vehicles which can be introduced with reasonable regard for the safety and convenience of the public, as well as every reasonable means of transportation, transmission, and movement beneath the surface of the ground, as well as upon or above it. And when the easement is acquired by the city it carries with it the right to use the street for street cars, for wires of telephone, telegraph, and electric lighting companies, and for water pipes, gas pipes, sewers, and such other similar arrangements for communication or transportation as future invention may make desirable. * * * Whether the plaintiff's premises are as desirable after the erection of these poles as before we need not inquire. If his light, which he claims is obstructed, is not as good as it was before, this is caused by an entirely proper use of the street abutting upon the property."

§ 368. **Public rights paramount after dedication.**—The practical attitude and progressive spirit of the Massachusetts court, which has been followed by many others, are indicated in the case of *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327, 100 Am. St. 577, decided in 1904, where the court held that abutting property owners are "bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel" for the reason that "the necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars

of them were foreseen or not," for as the court said: "It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if the surface alone is used. Our system, which leaves to the landowner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of abutters."

§ 369. **Public entitled to underground use of streets.**—This court further extended the application of this principle in the case of *Cheney v. Barker*, 198 Mass. 356, 84 N. E. 492, 16 L. R. A. (N. S.) 436, decided in 1908, by refusing to find that the laying of pipe lines through and under a public street imposes an additional servitude for which the abutting property owner is entitled to compensation for it is a reasonable use required by public necessity and convenience to which the public is entitled without further payment, for as the court said: "As practically the landowners get the full value of their land in such cases, if there is any injustice it is not they who suffer it. * * * The same doctrine has been applied to such underground uses of the public streets as the laying of common sewers, main drains, water pipes, conduits, subways, and gas mains, either by private companies or by officers acting for the public. * * * We can not doubt the power of the legislature to authorize the laying of lines of gas pipes under the surface of the public streets without providing any compensation for the owners of the fee in the soil of those streets. * * * Our roads or public ways are established for the common good and for the use and benefit of all the inhabitants of the commonwealth. The mere fact that the burden of their construction and maintenance has to a large extent been put upon the cities and towns in which they are situated gives to those cities or towns or to their inhabitants no peculiar privileges in such ways."

§ 370. **Travel in streets relieved by public utility services.**—The Supreme Court in the case of *Julia Bldg. Assn. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398, decided in 1885, furnishes an early authority which has long since been regarded as also a

leading one indicating the favorable attitude of that jurisdiction in encouraging the extension of municipal public utility service by holding that the installation of the necessary equipment to render such service does not constitute an additional servitude or burden for which payment must be made. This case probably furnishes the strongest argument in support of the more progressive authorities to this effect in the following language: "These streets are required by the public to promote trade and facilitate communications in the daily transaction of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point he is entitled to use the street, either on foot, on horseback, or in a carriage, or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman or carriage."

That gas mains in the streets are not additional servitudes because in effect their use relieves the streets of transporting fuel therein is the progressive attitude of the court in the case of *Cloverdale Homes v. Cloverdale*, 182 Ala. 419, 62 So. 712, 47 L. R. A. (N. S.) 607: "While water is in all climates necessary to all human life, savage and civilized, in our climate fuel is an essential to all civilized life. In our climate every civilized home must possess the fuel necessary to provide that home with heat sufficient to meet the requirements of the kitchen and the de-

mands of its occupants for the comforts which only heat can supply. The method provided by the Cloverdale Homes for supplying its properties, and the properties of its vendees and all others who may pay for that right, with heat is not only economical but is a method which probably puts the streets of Cloverdale as a matter of fact to less servitude and the inhabitants of Cloverdale to less inconvenience than any other known method. Heavy loads of coal and wood, when hauled about upon the highways, are more likely to produce injury to such highways than a flow of gas through a gas main firmly and properly imbedded in the street and at a proper distance under the surface of such street."

§ 371. **Lighting system no additional servitude.**—That the use for which streets and highways are dedicated is enhanced and extended by their being properly lighted is the effect of the decision in the case of Gulf Coast Ice Mfg. Co. v. Bowers, 80 Miss. 570, 32 So. 113, decided in 1902, where the court in permitting the erection of the necessary equipment for the purpose of lighting the streets observed that of necessity the easements in the use of the streets of the municipality are greater than in that of other highways and that the interest of the public rather than of the abutting property owner must determine the extent of the reasonable uses to which the streets may be subjected, and held that no additional servitude was created, for as the court said: "While the lighting of the streets of a city may be a great convenience to the traveling public, especially under some conditions, the poles, wires, and other necessary appliances for so doing are often a positive inconvenience to the abutting landowner, considered merely as such. But the proprietary rights of the landowner, whether the fee or a mere easement thereon be in the public,² are greatly modified by the rights of the public, which is entitled to a free passage over the streets, and to the benefit of lights constructed and operated for that end. And if a town or city may light its streets, as being an object for which the street is opened, without paying the abutting property owner damages for the erection of needed appliances therefor, it must follow that the municipal authorities may authorize some other person to furnish such lights."

This principle denying that lighting system towers and wires are additional servitudes is clearly upheld in the case of Karcher

² Theobald v. Louisville, N. O. &c. R. Co., 66 Miss. 279, 6 So. 230, 4 L. R. A. 735, 14 Am. St. 564.

v. Wheeling Electrical Co., 94 W. Va. 278, 118 S. E. 154, 30 A. L. R. 1044: "We conclude that defendant has the lawful right to transmit its electric energy over the streets of Moundsville, and is not confined in so doing to any particular portion of the street, unless contrary to its franchise from the municipality; that because it is transmitted near to plaintiff's lot does not ipso facto make a cause of action for damages to her property; that the towers and wires do not constitute an additional servitude on the streets to the detriment of her property, for which she can be heard to complain; and that the allegations of the declaration do not state a cause of action."

In no event can the municipality claim compensation as for an additional servitude after the installation of the public utility without such liability for as the court said in the case of Burlington Light & Power Co. v. Burlington, 93 Vt. 27, 106 Atl. 513: "If an additional burden is created by a line of poles and wires in the streets the city has no proprietary right of compensation. The right to grant the privilege of occupying the streets as the plaintiff was doing and to fix the terms and conditions thereof is primarily with the legislature. Town of Barnet v. Passumpsic Turnpike Co., 15 Vt. 757. The legislature delegated certain power in this regard to the city council of Burlington in the amended charter of 1896; but when the plaintiff's lines were being constructed the city government had no such power. Before the ordinance in question was adopted the right of the plaintiff to occupy the streets of the city with its lines had become vested, and the city council could not, by a subsequent ordinance, revoke or infringe that right. Rutland Electric Light Co. v. Marble City Electric Light Co., 65 Vt. 377, 380, 26 Atl. 635, 20 L. R. A. 821, 36 Am. St. 868; City of Barre v. Perry & Scribner, 82 Vt. 301, 309, 73 Atl. 574."

While the public utility has the right to maintain an aerial power line on its poles and have access to it for the purpose of maintenance and repair, such a line must be constructed and maintained so as to permit of the reasonable use of the land by its owner; otherwise, the public utility becomes a trespasser, and it is also liable for a failure properly to maintain and insulate its wires. In holding such a public utility liable for negligence in failing to place its wires at a sufficient height or to insulate them properly, the court in the case of Anderson v. Southern California Edison Co., 77 Cal. App. 328, 246 Pac. 559, said: "Whatever interest defendant company may have in the land in question by reason of the asserted easement, the right

of the owner thereof to its use of the land for any purpose was not abridged, provided only that such use did not conflict or defeat the rights of the company in the use of its lines. In other words, the interest of the company was not an exclusive one. Giving the evidence the full force contended for, it shows at most a right for maintenance of an aerial power line supported by poles resting in the ground, and does not affect the right of the owner to the surface use of the land except in so far as such surface is reasonably necessary for the purposes of ingress or egress and for maintenance and repair. There is no evidence in the record to show that the presence of the building in any manner restricted or limited defendant's alleged easement, or that the company ever objected to its erection or maintenance.

* * * In the enjoyment of its asserted interest, it was the duty of the defendant to keep within its limited interest and to so erect its aerial right-of-way as not to interfere with the reasonable use of the surface of the soil to which the owner had made avail. In failing to do so, it became itself a trespasser on the rights of the owner and those claiming under him. *Citizens Telephone Co. v. Cincinnati R. Co.*, 233 S. W. 901, 192 Ky. 399, 18 A. L. R. 615. Defendant not having the exclusive and unlimited right to the surface of the soil, it was its duty in using the dangerous force of electricity to exercise great care to prevent injury to persons making lawful use of the property. * * * It is only in accord with reason and common sense that persons controlling so dangerous and subtle an agency as electricity should use a high degree of care. Either the wires must be insulated or at least placed beyond the danger line of contact with human beings. While the law does not require the wires to be insulated everywhere, where there is reason to apprehend that persons may come in contact with them in the pursuit of their calling or where they may be reasonably expected to go, they should in some manner be protected. Here no notice or protection of any kind or character was ever given or made. It has been held in this state that an electric company is required to use very great care to prevent injury to person or property, and it is sufficient proof of negligence for it not to raise its wires so high above a roof on which they are placed that those having occasion to go there will not come in contact with them."

§ 372. Modern improvements included in "public purposes."

—The rapid growth of municipalities resulting in the constant extension of their limits into what had been rural districts, thereby converting country highways into municipal streets

furnishes a positive practical reason for the court's refusing to limit the uses of the streets and other highways to those contemplated by the parties at the time of the dedication. It is obvious that such a rule would not only prohibit the growth of municipalities and the extension of their territorial limits, but that it would impede progress resulting from new inventions and modern improvements which advancing civilization affords. The term "public uses" for which the streets and highways are dedicated therefore are not only such uses as walking, riding or traveling in vehicles drawn by animals, but also such methods of travel and communication as are afforded by the street car operated by electricity, the automobile and such other methods of travel and communication in addition to, or by way of substitution for those in vogue at the time of the dedication as may result from future invention and further progress; all of which both reason and necessity require shall be recognized and accepted as proper and reasonable uses of the street for transportation and communication, for as the Supreme Court of Indiana in the case of *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. 358, decided in 1898, said: "If this were not true, the way originally dedicated for a suburban highway, but by the growth of population becoming a city street, or the dedication of a village or town street afterwards becoming the principal thoroughfare of a great city, would be limited to the uses in vogue at the time and suited to the country road or the village or town street; and the growth of population, the advancement of commerce, and the increase in inventions for the aid of mankind would be required to adjust themselves to the conditions existing at the time of the dedication, and with reference to the uses then actually contemplated." Concluding its opinion, which furnishes an excellent discussion of the authorities on this point and a practical disposition of the matter, to the effect that the use of the streets for the equipment of a telephone system does not constitute an additional servitude for which the abutting property owner is entitled to compensation, the court said: "The telegraph, however, has never been employed as a means of intraurban communication. It requires skilled persons to receive the messages, and then they are to be carried to the persons for whom they are intended by just such means and uses of the streets as would other written communications. The telephone is particularly useful in communications between the people within a city, and it can be used for that purpose directly, and by persons without special skill. It is

more clearly a substitute for the old methods of the communication of messages between persons within the city than the telegraph."

§ 373. **Necessary underground conduits included.**—In holding that the construction in the street of a conduit for telephone cables and wires for the use of the public in communicating by electricity is a use of the street entirely consistent with the purposes of its dedication and does not constitute an additional servitude, the same court in the case of *Coburn v. New Tel. Co.*, 156 Ind. 90, 59 N. E. 324, 52 L. R. A. 671, decided in 1901, said: "The general doctrine of these cases is that in locating, marking, and dedicating streets in plats of land for urban residences, the purpose of the dedication, in the absence of controlling language, is conclusively presumed to be for the accommodation of public travel, traffic, and communication. Anything which reasonably facilitates these ends is, therefore, consistent with the dedication. * * * Whenever the necessity exists, any use of the street by reasonable structures and devices, above or below the surface, which will enable the citizens to communicate without actual travel upon the streets, and which does not materially obstruct the ingress and egress and light and air of abutting property, is within the contemplated purpose of the dedication, and not a new burden upon the fee."

That there is no additional servitude in placing underground conduits for electric or telephone service because this does not constitute an obstruction to property and does provide a local service for the use and convenience of abutting property owners and furnishes a means of communication, which relieves the streets and highways, is the effect of the decision in the case of *Laurel Garden Corp. v. New Jersey Bell Tel. Co.* (N. J.), 160 Atl. 549, where the court said: "In early days, the king and his people passed on foot or on horse, and that was the extent of the servitude. The landowner did not build tall buildings on his land, but used the same for residences, the tillage of the soil, or the sale of small wares. Society was less complicated, and there were neither sewers, gas pipes, water pipes, electric wires, or conduits. Communication was slow and difficult, and the surface of the highway was sufficient for all public purposes. Today such a surface use is insufficient. * * * It is apparent from the foregoing that, by the great weight of American authority, the placement, under the highway, of sewers, drains, gas pipes, and water pipes is regarded as entirely consistent with the primary use of the highway and of no detriment to the

abutting landowners, and further that such conveniences may be placed, without compensation, because they facilitate travel, and are in furtherance of the purpose for which the easement was anciently acquired by the public. On the other hand, it is settled by the great weight of authority that wires and poles, whether used for telephone, telegraph, or electric light lines, other than for street lighting, are subject to another and different rule, since they are obstructions and interfere with the public right of passage over the highways, and are a detriment to the proprietor of the soil. In our cities, the telephone, telegraph, and electric light wires not only endangered the safety of the traveling public, but were unsightly, and in case of storms a menace to the life, property, and safety of the abutting owner. The subsurface placement of wire conduits has proved to be of great public and private advantage. * * * There can be no distinction in utility or convenience between the conduits which bring gas, water, and electricity either for light, power or the transmitting of telephone and telegraph messages. * * * In 1878 the telephone subscribers in London were less than a dozen. Today there are twenty million telephones in the United States. The wires leading to these instruments must, in congested districts, be placed under the surface of the highway, and, when so placed, travel is facilitated; the abutting owner is benefited, the fire hazard is reduced, and there is a furtherance of the use for which the public easement was acquired. Tall buildings, modern business, and the temper of our people require that the avenues of communication be kept open. Just as the abutting landowner was served and benefited by sewers and drains and by pipes, which brought pure water to his house, and by illuminating gas, with all of its advantages for heating and lighting, he is now benefited by conduits which bring electric current and the wires over which, by convenient devices, spoken messages may be carried to the business man, neighbor, friend, or relative with speed and certainty. Conduits for the carrying of wires and cables have become annexed as incidents by usage and custom to the rights of the public in the highway, and, instead of being a burden, are of incalculable benefit to the adjoining landowners."

§ 374. **Streets and other highways formerly distinguished.**—By way of illustration of the distinction in the nature and extent of the servitude in the street and country highway respectively which was frequently made by the earlier decisions, the case of *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602, 19 Am. St. 113, decided in 1890, is of in-

terest although it can not be said to represent the current authority or the prevailing tendency of the decisions in making such distinction. In permitting a recovery of damages for the invasion of the rights of the abutting property owner from the laying of gas pipe lines in the country highway, this court made a strict literal construction and a conservative application of the principle under discussion. In the course of its opinion the court said: "The rule declared by our own cases is in harmony with the very ancient and well-settled rule that the public acquires, except in cases where the seizure of the fee is authorized, nothing more than a right to pass and repass, and the great weight of authority sustains the doctrine laid down by our decisions. There is an essential distinction between urban and suburban highways, and the rights of abutters are much more limited in the case of urban streets than they are in the case of suburban ways.

* * * The authorities, although not very numerous, are harmonious upon the question that laying gas pipes in a suburban road is the imposition of an additional burden, and that compensation must be made to the owner."³

A distinction between streets and highways is often made in determining whether the laying of pipes constitutes an additional burden or servitude, because of the different uses which are ordinarily made upon and beneath the surface of streets and highways in the open country. This principle, distinguishing between urban and rural ways, is furnished by the case of *West v. Maryland Gas Transmission Corp. (Md.)*, 159 Atl. 758: "When an owner of the fee in the open country, where an easement of way has been granted for the use of the public, lays a pipe line under the road in such a manner as in no way to interfere with the maintenance of such way and the free and unobstructed passage thereover by the public, he is not seeking a privilege or franchise which may be granted or withheld by the county commissioners. He is merely exercising one of the incidents of ownership which, in conveying the easement of way, he has retained to himself. *Colegrove Water Co. v. Hollywood*, 151 Cal. 425, 90 Pac. 1053, 13 L. R. A. (N. S.) 904. There is a logical and important distinction between the incidents accompanying or pertaining to an easement of way in a city street and highways in the open country, because the uses to which the surface and the subsurface are usually put are different in the one case from

³ This case was followed in *Consumers Gas Trust Co. v. Huntsinger*, 12 Ind. App. 285, 40 N. E. 34.

the other. “* * * The authorities, although not very numerous, are harmonious upon the question that laying gas-pipes in a suburban road is the imposition of an additional burden, and that compensation must be made to the owner.”

§ 375. **Distinction no longer obtains.**—The case of *Mordhurst v. Ft. Wayne & S. W. Traction Co.*, 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. 222, decided in 1904, furnishes a progressive decision which materially modifies the rule of the *Kincaid* case decided by the same court. While conceding that the abutting property owner is entitled to recover any actual special damages sustained by reason of the construction and operation of the interurban electric traction line, this court distinguished such a use of the street from that of the steam railway and refused to find that it constituted an additional servitude, for as the court observed in the course of its well-reasoned opinion: “It is apparent that every objection founded upon injury to his property rights which the plaintiff can justly urge against the use by the defendant of Fulton street in front of plaintiff’s lot would apply with equal force to the use of that thoroughfare by an electric street railroad constructed and operated wholly within the city limits. But this court has held that such a street railroad is not an additional burden upon the street, and that the owners of abutting real estate are not entitled to compensation on account of such appropriation and use.”⁴

* * * A street platted or otherwise laid out in a city or town of this state is thereby dedicated to the use of the public, and not exclusively to the use of abutting property, or to the convenience or profit of any or all of the inhabitants of the particular municipality. It forms a part of the great system of highways of the state, and its use for intercommunication with other neighborhoods, towns, and cities is one of its most important purposes. In many respects it is governed by the general laws regulating public ways. Discriminations in the terms and conditions on which it could be used in favor of the abutting lot owners, the residents on the particular street, or the inhabitants of the city, and against nonresidents, could not be tolerated. The dedication of a street must be presumed to have been made, not for such purposes and uses only as were known to the landowner and platter at the time of such dedication, but for all public purposes, present and prospective, consistent with its

⁴ *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561; *Chicago & C. Terminal R. Co. v. Whit-*

ing H. &c. St. R. Co., 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. 264.

character as a public highway, and not actually detrimental to the abutting real estate. * * * Rapid and cheap transportation of passengers, light express and mail matter, between neighboring towns and cities may be quite as necessary and as largely conducive to the general welfare of the places so connected and their inhabitants as the like conveniences within the town or city. Where such transportation is furnished by an interurban electric railroad operated under the conditions and restrictions contained in the agreement between the appellee and the city of Ft. Wayne, we do not think the construction and operation of such a railroad in such manner constitutes an additional servitude upon the street which entitled abutting property owners to compensation."

§ 376. **Steam, street, and interurban railways distinguished.**—This decision is limited, however, by that of the same court in the case of *Kinsey v. Union Traction Co.*, 169 Ind. 563, 81 N. E. 922, decided in 1907, which is also concerned with the maintenance and operation of an interurban electric traction line. And while the court in this case also expressly refused to find that such a user constituted an additional servitude it upheld the right of the abutting property owner to recover any special damages actually sustained in connection with the operation of such an electric line. The distinction in the two cases is based upon the difference in the nature and extent of the business and in the manner of the operation of the different lines; it appearing that the latter case in many respects was fairly comparable to that of the steam railway rather than the ordinary street railway, for as the court said: "It is shown to frequently run passenger trains composed of three large cars, and to run daily freight trains of a like number of heavy cars. It is neither a street railroad in fact, nor is it in any sense shown to be operated for street purposes. To further emphasize, we have, under the facts, a railroad which in no sense is operated to promote the utility of the public streets of the city of Indianapolis. It is not merely engaged in doing business between the latter city and its suburbs. It is not an extension of a city street railway over intervening territory between neighboring cities or towns, carrying passengers and light freight; but it is absolutely an independent railway, engaged in a general passenger and freight traffic between distant cities and communities. Its cars are not light and small when compared with those of the ordinary steam roads. As a result of its operation, the usual discomforts and annoyances due to the operation of the ordinary steam roads

are present, viz., loud noises, dirt, and dust, shaking or vibrations of the ground, and other annoyances or detriments which affect the owners of abutting property situated on the streets over which the road is operated. There is also the presence of danger or peril which continually menaces the safety of persons using the public street."

This distinction between urban and rural transportation service is made in the case of *Milwaukee v. Milwaukee Electric R. & Light Co.*, 173 Wis. 400, 180 N. W. 339, 181 N. W. 821, 13 A. L. R. 802: "Our court has held * * * (b) that country highways or streets outside of city limits are not subject to ordinary surface street railway service without extra compensation to the owners of abutting lands who thereby suffer serious impairment to their access thereto. *Zehren v. Milwaukee Electric R. & L. Co.*, 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, 67 Am. St. 844. (c) That neither city streets nor country highways are subject to interurban surface railway service without compensation to the owners of abutting lands. *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.*, 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856, 60 Am. St. 136; *Younkin v. Milwaukee L., H. & T. Co.*, 120 Wis. 477, 98 N. W. 215; *Beloit, D. L. & J. R. Co. v. Macloon*, 136 Wis. 218, 116 N. W. 897; *Schuster v. Milwaukee E. R. & L. Co.*, 142 Wis. 578, 126 N. W. 26. * * * From the foregoing it follows that the operation upon an urban surface street railway by the owner of the franchise therefor of cars reasonably suitable for street car service, and which give street car service in such manner as the railroad commission may prescribe, or, in the absence of regulations by the commission, give reasonable street car service, does not subject the adjacent property within the city limits to an additional servitude; * * * and the operation of such cars within the city limits does not require any franchise additional to the urban surface street car franchise."

The construction and operation of a street railway system for passenger service on the streets of a municipality is not an additional servitude and does not constitute the "taking of property" under the constitution, thereby entitling the owner of adjacent property to compensation for such use; and the fact that such owner acquiesced for more than ten years in the use of such property by the city as a street precludes him from objecting to the use of such property for street purposes or to its use by the street railway with the consent of the city. This principle is clearly established and defined as follows in the case of

Tribble v. Dallas R. Co. & Terminal Co. (Tex. Civ. App.), 13 S. W. (2d) 933, where the court expressed the rule as follows: "We therefore hold that, by acquiescence by unequivocal acts, inducing the city to pave in part at public expense, plaintiffs dedicated whatever interest they owned in the land to the public for use as a street, and are now estopped to gainsay that fact. Furthermore, we find that the evidence established a prescriptive right in the city to use the strip of land as a part of its street system. The evidence is uncontradicted that, without objection, plaintiffs acquiesced in the open and continuous use, by the public, of the strip as a street for more than ten years prior to the institution of this suit. The law is well settled that a road or street becomes a highway by prescription when the owner, or his predecessors in title, permits the public to use same openly, continuously, and uninterruptedly for ten years. * * * The law is definitely settled in this state to the effect that the construction and operation of a street car line for passenger traffic, on public streets of a city, does not impose an additional burden upon land, nor constitute such a taking of or damage to property within the meaning of the constitution as entitles the owner to compensation."

§ 377. *Interurban railway no additional servitude.*—The court, again, in the case of *Pittsburgh, C., C. & R. Co. v. Muncie &c. Trac. Co.*, 174 Ind. 167, 91 N. E. 600, decided in 1910, involving the question of interurban lines, decided that such a user did not constitute an additional servitude, although it appeared that not only passengers but baggage, express, freight and the United States mail were carried by the defendant company, for as the court said: "It is not necessary for us to review said cases cited by appellant, for the reason that this court, after a careful consideration of all the authorities, has held otherwise; that the same is not such an additional burden and servitude upon the street as to require an assessment and payment of compensation to the abutting lot owners or other owners of the fee in the street as a condition precedent to the occupancy and use of the street by said interurban company, or for which such owners of the fee in the street are entitled to recover damages."⁵

§ 378. *Telephone lines additional servitudes in Illinois.*—Although the Supreme Court of Illinois in the case of *McWethy v.*

⁵ *Kinsey v. Union Trac. Co.*, 169 Ind. 563, 81 N. E. 922; *Mordhurst v. Ft. Wayne &c. Trac. Co.*, 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. 222.

Aurora Electric Light &c. Co., 202 Ill. 218, 67 N. E. 9, decided in 1903, observed that: "Since the discovery and use of electricity for lighting purposes, it has generally, if not universally, been held that, the fee to public streets being in a municipality, with general power to regulate the use of the same, such municipality may lawfully authorize private corporations or individuals to erect electric light poles on its streets, and stretch wires upon them, in order to provide lights for its own use and that of its citizens, provided that in doing so they do not materially obstruct the ordinary use of the streets for public travel;" this same court, in the case of Burrall v. American Tel. & T. Co., 224 Ill. 266, 79 N. E. 705, 8 L. R. A. (N. S.) 1091, decided in 1906 that the equipment necessary to operate a telephone line in the streets constituted an additional servitude. In the course of its opinion, which is directly contrary to the authorities above considered, the court said: "A telephone line in a public highway is an additional burden upon the fee, for which the owner of the fee is entitled to compensation.⁶ * * * The maintenance and user of the telephone line, and the addition of new crossarms, wires, and insulators, constitute a continuing trespass, which equity has jurisdiction to prevent by injunction.⁷ * * *

The jurisdiction of equity is not denied, and there is no pretense that the defendant had any right to appropriate the property of the complainant to its own use without compensation. The sole claim made in support of the decree is that the complainant stood by and permitted defendant to construct the line and has not interfered with it since, and therefore she is not entitled to an injunction. The fact that a large number of long distance telephone messages are sent over this line daily, and therefore it would be convenient for the public to have the defendant occupy complainant's land, is of no importance whatever. If the land is needed for a public use, the law provides a way for acquiring it, and the constitution prohibits its appropriation for such a use without compensation. It was stipulated that, if the defendant can not go across this land, it will have to go around it, and, of course that would be so whether the parties stipulated the fact or not; but the defendant can procure the right to impose the additional burden on the fee by proper proceedings under the law of eminent domain."

⁶ Postal Tel. Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722, 62 Am. St. 390.

178 Ill. 29, 52 N. E. 973, 43 L. R. A. 645, 69 Am. St. 286; Russell v. Chicago &c. Elec. R. Co., 205 Ill. 155, 68 N. E. 727.

⁷ Carpenter v. Capital Elec. Co.,

§ 379. **Light being necessity is not additional servitude.**—The Supreme Court of New York in the case of *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, decided in 1899, held that the erection of poles and wires in the highways for the purpose of lighting them by electricity does not constitute an additional servitude. In the course of this very practical decision, which clearly represents the law on this phase of the subject, the court recognized that the extent of the easement of user in the street is determined by the necessities of the public for which it is maintained, for as the court said: "In the darkness of the night, in crowded thoroughfares, light is an important aid, largely tending to promote the convenience, as well as the safety, of the traveling public. It is not only one of the uses to which the public ways may be devoted, but, in the case of crowded thoroughfares, a duty devolves upon the municipality of supplying it. In such cases it is one of the burdens upon the fee which must be borne as an incident to the public right of traveling over the way, and is deemed one of the uses for which the land was taken as a public highway. * * * Light may not be necessary in an ordinary country highway, and yet there may be country roads in which the travel is so great as to make light a necessity in order to avoid collisions and injuries in the nighttime."

§ 380. **Telephone system held additional servitude in New York.**—This court, however, in the earlier case of *Eels v. American Tel. & T. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640, decided in 1894 that the construction in the country highway of the poles and wires necessary to maintain and operate a telephone and telegraph system constitutes an additional servitude for which the abutting property owner is entitled to compensation for the reason that this use is entirely different from that of actual travel by the public. In the course of this opinion which is contrary to the prevailing current line of decisions the court said: "We think neither the state nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous, and exclusive use by setting up poles therein, although the purpose to which they are to be applied is to string wires thereon, and thus to transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation; but the constitution provides that private property shall not be taken for public use without compensation to the owner. * * * It is not a mere difference in the kind

of vehicle, or in their number or capacity, or in the manner, method, or means of locomotion. All these might be varied, increased as to number, capacity, or form, altered as to means or rapidity of locomotion, or transformed in their nature and character, and still the use of the highway might be substantially the same—a highway for passage and motion of some sort. Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway. * * * It has the power to take the land upon making compensation, and hence the refusal of an owner will not stop the proposed undertaking.”

§ 381. **Street railway systems held additional servitude.**—This same court, in the case of *Rasch v. Nassau Electric R. Co.*, 198 N. Y. 385, 91 N. E. 785, 36 L. R. A. (N. S.) 645, decided in 1910, held that the equipment necessary to the operation of a street railway is not included in the use to which the street was dedicated and therefore constituted an additional servitude for which the abutting property owner is entitled to be compensated. Although this decision follows the earlier authorities of this jurisdiction, they stand practically alone, for it has been generally held that the street railway system regardless of its motive power does not constitute an additional servitude in the street because it serves a purpose peculiar to the use of the street for which it was dedicated and as a result of the improved methods it aids very materially in facilitating actual transportation. That the case truly represents the New York jurisdiction, however, appears from the following extract: “But the rights of the plaintiff in this case rest on a different foundation. She is the owner of the fee subject to the public easement. It was held by this court over forty years ago in *Craig v. Rochester City & B. Railroad Company*, 39 N. Y. 404, and reiterated seven years ago in *Peck v. Schenectady Railway Company*, 170 N. Y. 298, 63 N. E. 357, that a street railroad is not a street use, but an additional burden placed on the land for which the owner of the fee is entitled to compensation. * * * For the first time the question was squarely presented to this court in *South Buffalo Railway Company v. Kirkover*, 176 N. Y. 301, 68 N. E. 366, and it was held: ‘Where land is acquired by a railroad company without the consent of the owner, he is entitled to recover the market value of the premises actually taken, and also any damages resulting to the residue, including those which will be

sustained by reason of the use to which the portion taken is to be put by the company'."

§ 382. **Subway transit system additional servitude.**—In the case of *In re Board of Rapid Transit R. Comrs.*, 197 N. Y. 81, 90 N. E. 456, 36 L. R. A. (N. S.) 647, 18 Ann. Cas. 366, decided in 1909, the New York Court of Appeals held that the construction of a subway beneath the streets of New York City and the operation of an electric street railway system therein constituted an additional servitude, for as the court said: "The subway occupies a part of the street, which although beneath the surface, might, by proper construction and change of grade, be used for ordinary highway purposes, and traveled upon freely, without license or recompense, by persons using their own vehicles or their own methods of transportation. The occupation by the subway and its trains of cars is exclusive, for no one may enter either without payment of fare. Highways are free and open to all the people; the subway is not. Highways are for the exclusive use of none; the subway is for the exclusive use of one. Highways are for travel by means under the exclusive control of the traveler; the subway is for travel by means under the exclusive control of its owner or operator. * * * When, however, the construction is not for a street use, even if it is for a public use, liability to the owner of the fee attaches to a city the same as to a railroad corporation. From the *Craig* case in 1868, to the *Peck* case in 1902, with the long line of cases intervening, the position of this court has been uniform and consistent in maintaining that surface structures and superstructures are an additional burden on the fee of the street.^a It follows as a logical sequence that a substructure, with the physical characteristics and consequences of that under consideration, must be governed by the same principle, so that a railroad constructed beneath the surface of a street is a new burden, not contemplated by the original owner of the land when it was devoted to use as a street."

In sustaining the right of an abutting property owner to damages for the construction of an underground rapid transit system, which it was held constituted an additional servitude, this principle was reiterated in the case of *In re New Street in City of New York*, 215 N. Y. 109, 109 N. E. 104, L. R. A. 1916A, 1290, Ann. Cas. 1917A, 119, where the court held: "On the other hand, whichever theory of use is adopted, it will remain true that even

^a *Craig v. Rochester City & C. R. Co.*, 170 N. Y. 298, 68 N. E. Co., 39 N. Y. 404; *Peck v. Schenec-* 357.

the legislature can not, by calling it such, transform into a street use one which is not such, and can not authorize without compensation as against abutting owners a use of streets not included within or consistent with their proper purposes and which are productive of special damages to such abutting owners. And it will make no difference with this rule for the purpose of this case whether the legislature attempts to impose an unlawful use upon a street which has already been opened, or upon one thereafter to be opened in ordinary street opening proceedings. In such a proceeding an abutting owner has received, or will receive, only such damages as it is estimated will arise from the use of the street for proper purposes."

§ 383. **Telegraph and telephone compared.**—While a number of cases decide and many more contain dicta to the effect that the telegraph constitutes an additional servitude because it does not furnish local service and is not adapted to the personal use of the abutting property owner as is the telephone, the decision in the case of *People v. Eaton*, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721, decided in 1894, classifies the telegraph with the telephone in holding that the necessary equipment of neither constitutes an additional servitude. The progressive tendency of this decision is indicated in the following language: "These telegraph construction acts have been in force in this state for many years, and this is the first time in the history of the state, so far as I have discovered, where it has been claimed that the placing of such poles in the highway is an additional servitude. We are aware that in some states the doctrine is laid down that the placing of such poles creates additional servitude upon the fee, but there are many cases holding the other way. *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7, and *Julia Bldg. Assn. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398, hold that additional servitude is not created, and, we think, upon better reasoning. * * * It would be a great calamity to the state if, in the development of the means of rapid travel, and the transmission of intelligence by telegraph or telephone communication, parties engaged in such enterprises were compelled to take condemnation proceedings before a single track could be laid, or a pole set."

§ 384. **Telephone new method of subjecting streets to old use.**—In holding that where land is dedicated for street purposes this includes any use devoted to the service of the public whether beneath or above as well as upon the surface of the street in-

cluding communication by telephone, which is but a new and improved method of effecting this purpose and not a new burden or servitude upon the fee of the abutting owner, the court in the case of *Frazier v. East Tennessee Tel. Co.*, 115 Tenn. 416, 90 S. W. 620, 3 L. R. A. (N. S.) 323, 112 Am. St. 856, 5 Ann. Cas. 838, decided in 1906, supports its decision by the following argument: "On the other side, it is said that in the widest and, likewise, the most correct, sense, a street is a means of intercommunication between the people of a city, for traffic, and for the conduct of personal and social intercourse, and also for the convenient use of dwellings and business houses abutting thereon; that its primary purpose is for passage, it is true, but that such passage need not be, alone that of people, animals, or wheeled conveyances, or of things that run upon the ground; that a message sent through the air upon electric wires, over the street, takes the place of one sent by man or boy walking, or upon horseback, or conveyed by a vehicle, along the street; that not only is the same service performed by the telephone, but in a manner far better, and more quickly; that, if the thousands of messages which go over such wires in a single day had to be conveyed by men or vehicles, or both, the streets would be far more thronged than they now are, and hence rendered less comfortable and less safe for use, and that in the course of a few months, or a year's time, the difference in the wear and tear of the streets would be very perceptible, because of such increased use; that the telephone is therefore but an improved method of subjecting the streets of a city to an old use, and that the poles and wires are just as necessary adjuncts to this new method as are the poles and wires of a street railway or an electric light plant, erected in substantially the same manner, and no more obstructive."

§ 385. **Use for public and private service distinguished.**—The difference in the service rendered, whether public or private, which is the point of distinction in some of the decisions which hold that the equipment of the municipal public utility providing private rather than public service constitutes an additional servitude because of that fact, is illustrated by the Court of Chancery of New Jersey in *Taylor v. Public Service Corp.*, 75 N. J. Eq. 371, 73 Atl. 118, decided in 1909, where the court said: "If, therefore, the defendants, by virtue of their contract and the proceedings of the municipality, had a right, as against the municipality, to erect these poles for the purpose of public lighting, the complainant, or any landowner similarly situated, could not prevent the placing of the poles, or their being used,

for the purposes of public lighting. But if the company was in this position, and used the poles for stringing wires for private lighting, the landowner, with respect to whose land no consent in writing had been given, had the right, by ejectment or by resort to equity, to restrain such misuse.”⁹

§ 386. **Nature of use generally not distinguished.**—This distinction, however, does not generally obtain and seems not to be in harmony with the present tendency of the later decisions. It is repudiated expressly by the Supreme Court of Alabama in the case of *Hobbs v. Long Distance Tel. & T. Co.*, 147 Ala. 393, 41 So. 1003, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461, decided in 1906, where the court also refused to distinguish between urban and rural highways in the following vigorous language along these very progressive lines: “So, on the subject of erection of poles for electric lighting, on streets, after some contrary decisions, the evident necessity is so great that it has come to be generally understood that it is not an additional burden, though there still remains in the decisions and text writers, the impression that it is saved by the fact that the light companies generally light the streets as well as private dwellings. * * * Our conclusion is that the public roads, when dedicated, were dedicated, not merely for travel on foot, or on animals, or in vehicles, but for locomotion by any means that should be afterwards discovered, and for communication between the citizens of the country, by carriers, on foot, or riding, or by any other means that might be found suitable and best. The mails could be sent over them in any way that was found most expeditious. If it had been found advisable to send the mails in metal boxes swung on wires far above the heads of the people, in place of in stages and by carriers, no one would have supposed it was an additional burden upon the abutting owner. So if it is found better to string wires high above the roads and convey messages by that mysterious something which is in the atmosphere and which seems to be as exhaustless as the bounties of Providence, it is accomplishing one of the great purposes for which public roads are dedicated. Some of the cases have drawn a distinction between urban and suburban roads, but in regard to wires and posts there would be more reason for declaring them burdensome in a city (where they accumulate in such numbers as to interfere with the operation of engines in extinguishing fire) than in the country where there are but few and far away from houses. * * * The

⁹ *Andreas v. Gas & Elec. Co.*, 61 Robb, 67 N. J. L. 260, 51 Atl. 509, N. J. Eq. 69, 47 Atl. 555; *French v.* 57 L. R. A. 956, 91 Am. St. 433.

qualification which we make is that, if the abutting owner shows that there will be actual and substantial injury to his property, he is entitled to compensation."

The policy of liberal construction and the attitude of our courts toward an increase of the sphere of municipal activity for the benefit of the city and its inhabitants is reiterated by the courts of Alabama in their decision to the effect that no additional servitude is created by the erection of poles and wires for the transmission of electric current for heat, light, and power along the highways, as well as in the streets, for the service of abutting property owners or tenants of such property. This principle is defined as follows in the case of *Crawford v. Alabama Power Co.*, 221 Ala. 236, 128 So. 454, where the court reasoned as follows: "The sole question presented is whether or not the erection of the transmission line on the public highway creates an additional servitude upon the fee of the abutting owner. The defendant company is a public service corporation, and the distribution of its electric current for heat, light, and power among the inhabitants of the territory to be served is a public use.

* * * In the erection, therefore, of the transmission line on the public road defendant was in the exercise of a legal right in a proper manner, and for a public purpose, as disclosed by the admitted facts. Upon the question of infringement upon the rights of the abutting property owner by the erection of such and kindred lines as telephone and telegraph, the authorities are in irreconcilable conflict. * * * We consider the question here presented as foreclosed by former decisions of this court. The two conflicting views above noted were squarely and forcefully presented in *Hobbs v. Long Distance Tel. & T. Co.*, 147 Ala. 393, 41 So. 1003, 1005, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461. The question was fully discussed and considered, and the case of *Frazier v. East Tenn. Tel. Co.*, 115 Tenn. 416, 90 S. W. 620, 3 L. R. A. (N. S.) 323, from the Tennessee Supreme Court, was cited with approval. In this latter authority the opinion noted the cases upon each side, and, while conceding that the weight of authority from a numerical standpoint was to the contrary, held that the better reasoning favored the broader and more expansive view, and that the erection of telephone poles and wires in the public street or highway created no additional servitude upon the fee. Such was likewise the deliberate conclusion of this court in the *Hobbs* case, the soundness of which has never been questioned by any subsequent decision. Indeed, a like course was followed upon the question of additional servitude in

the construction of an electric street railway. * * * In the Hobbs case, the court reasoned that it was as much a proper use of the highway to send a message by electrical vibrations over the wire as by letter in a mail pouch, and that the abutting property owner had no more cause for complaint in the one than in the other. The same line of reasoning, therefore, must be held applicable to the sending of the electric current for heat, light, and power. * * * Indeed, it is common knowledge that in many rural sections within the borders of this state these modern improvements already exist and are in daily use by those bordering the territory so served, and who is bold enough to deny that within the not far distant future the public highways in rural districts may also be in a large measure electrically lighted? *Palmer v. Larchmont Elec. Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672. The vanguard of progress moves steadily onward, and such a prophecy has as firm a foundation as existed for the rural telephone in the Hobbs case. In principle, therefore, the distinction between urban and rural districts is without effect upon the question here presented."

§ 387. **Street and rural highway not distinguished for telephone.**—A number of later cases also refuse to make the distinction, which was at one time made by several jurisdictions, between the nature and extent of the easement of the use of municipal and rural highways. A further characteristic opinion to this effect is furnished in the case of *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410, decided in 1905, where the court in refusing to find that an additional servitude is created in the erection of the necessary equipment for the operation of a telephone system along the country highway said: "The cases which hold that there is no new or additional servitude further hold that the use of the public highway for telegraph or telephone lines must be reasonable. Our case of *Maxwell v. Telegraph Co.*, 51 W. Va. 121, 41 S. E. 125, is in line with the cases holding that there is no additional servitude by the placing of telephone poles and wires for a telephone for public use along the public highway. Judge Dent, in delivering the opinion of the court, said: 'Telephone poles are not things of beauty, yet their utility is so great that their ugliness must be endured until human invention has discovered some more tasteful substitute for them. The public can well afford to surrender a reasonable portion of the public easement in its highways to a public utility of such vastly increasing importance. As the owner of the fee in such highway loses nothing thereby, he has no grounds of complaint.

It puts no additional burden on the fee, but it is a burden alone upon the permanent easement to which it is appurtenant and subservient.' This case is binding authority on this court, and necessarily brings us to the conclusion that there is no additional servitude by the reasonable use of a public highway for the purpose of placing telephone poles and wires for public use along it. We are aware that some authorities make a distinction here between a street of a town or city, and a county road in the country, but we see no sound reason for the distinction."

A well expressed decision to the same effect is that of *Cumberland Tel. & T. Co. v. Avritt*, 120 Ky. 34, 85 S. W. 204, 8 Ann. Cas. 955, decided in 1905, where the court said: "There is no sound distinction between urban and rural highways as to the purposes for which they may be used. Public highways are designed as avenues of communication, and a telephone line along a country road is no more an additional servitude than a telephone line along a railroad right of way. No use of the highway can be made which practically subverts its use by the public in the ordinary way, nor may it be used for any purpose not public. The wires of a telephone company are no less immovable, than the rails of the railroad, and they are no more a burden to the adjoining property than the rails. The great weight of authority is to the effect that a telephone line on a public highway is not an additional servitude in those states maintaining the Kentucky rule that a railway is not an additional servitude."

§ 388. Tendency of decisions progressive and practicable.—

A further case to this effect which is frequently cited as authority and generally recognized as a leading one is that of *Cater v. Northwestern Tel. Exchange Co.*, 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. 543, decided in 1895, where the court in holding that any use of the highway whether for travel or communication of intelligence by the methods known at the time of the dedication or by any new ones are all included within the purposes of the dedication and impose no additional servitude; provided, of course, that they do not unreasonably impair the special easements of access, light and air belonging to the abutting property owners, for as the court said: "It seems to us that a limitation of the public easement in highways to travel and the transportation of persons and property in movable vehicles is too narrow. In our judgment public highways whether urban or rural, are designed as avenues of communication; and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because

these were the only modes of communication then known; that as civilization advanced, and new and improved methods of communication and transportation were developed, these are all in aid of and within the general purpose for which highways are designed."

The decision in the case of *Hershfield v. Rocky Mountain Bell Tel. Co.*, 12 Mont. 102, 29 Pac. 883, decided in 1892, furnishes a further excellent statement of this principle, together with the practical reason upon which it is based, in the following language: "In this view (and it seems to be very practical), the telephone pole would in fact facilitate passage upon the street, for it would constantly keep out of it a hundred or perhaps a thousand-fold more of encumbrances than it brings in, by enabling persons to communicate without physically passing through the streets to meet one another. We think that to use the street in a reasonable manner, and to a reasonable extent, for this purpose, is just and proper, and is within the uses to which the street may lawfully be put, when such use is sanctioned by the public through its duly authorized municipal agents."

The Supreme Court of Kansas in the case of *McCann v. Johnson County Tel. Co.*, 69 Kans. 212, 76 Pac. 870, decided in 1904, showed itself to be abreast of the times in permitting the use of the streets to facilitate travel or the communication of intelligence by any modern method of travel and communication which may be invented, for as the court said: "The purpose of the highway is the controlling factor. It is variously defined or held to be for passage, travel, traffic, transportation, transmission, and communication. It is a thoroughfare by which people in different places may reach and communicate with each other. The use is not to be measured by the means employed by our ancestors, nor by the conditions which existed when highways were first devised. The design of a highway is broad and elastic enough to include the newest and best facilities of travel and communication which the genius of man can invent and supply. * * * The messages transmitted over the line are a substitute for the messengers who formerly passed over the highway, and thus to a great extent relieve it from the burdens and wear of travel. No modern invention has contributed more to commercial and social intercourse than the telephone."

To the same effect, in indicating the favorable attitude of the courts toward the free use of streets and highways, the court in the case of *Jones v. Dallas R. Co.* (Tex. Civ. App.), 224 S. W.

807, held: "Again, we are most clearly of the opinion that the franchise itself, as enacted after being indorsed by the popular vote, includes the privilege of constructing and operating this additional line. We think the franchise grants the privilege of using any street in the city of Dallas as it then was or shall be in the future, and the action of the board of commissioners in permitting or requiring particular extensions over particular streets is the exercise of a regulatory power and not the granting of a new franchise. * * * Abutting property owners have no right whatever to restrain the building or operating on a certain street or street car line, any more than the citizens at large have, unless they are granted the same by the legislative authority."

This principle is recognized and extended in its application in the case of *Smith v. Central Power Co.*, 103 Ohio St. 681, 137 N. E. 159: "In order to have the convenience of electricity throughout cities generally, it is necessary that the electric energy should be transported by means of wires over the streets, alleys and public places. It would be manifestly impossible to keep entirely on private property. * * * The new appliances are but rapid transit methods of supplying the modern wants of the people, the wires supplanting the messenger, the carrier and the postman, and the rails and pipe lines supplanting in part the vehicular traffic."

§ 389. **Modern inventions for or in lieu of travel included in public purposes.**—The Supreme Court of South Dakota in the case of *Kirby v. Citizens Tel. Co.*, 17 S. Dak. 362, 97 N. W. 3, 2 Ann. Cas. 152, decided in 1903, gave effect to this comprehensive definition of the uses to which the streets are dedicated so as to include the more modern methods and later inventions, all of which tend to facilitate travel and communication, for as the court said: "The streets of a city are now used for many purposes unknown in former times. A century ago or less there was practically no use of the streets for sewers, laying of water and gas pipes and operating street railways, but with the advance of civilization and the improved conditions of society these uses have become a necessity, and recognized by the courts, and quite generally held as not adding any new servitude to the abutting fee owner for which he is entitled to compensation. The telephone is but a step in advance of former methods of conveying intelligence and information, and is a substitute for the messenger and carrier of former times."

§ 390. Conservative decisions find additional servitudes.—

The following cases are given to illustrate the attitude of those courts which hold that an additional servitude or burden is created in the construction of such wires and poles along streets and public highways as are necessary to provide electric light and communication by wire and at the same time to point out that even the jurisdictions so holding are now of the opinion that there is no reason for distinguishing between the urban and rural highway nor between those cases where the fee is in the abutting property owner or the public. These cases therefore are consistent with the current authorities generally, except as to there being an additional servitude created and this point of distinction is due to the difference in the definition of the uses for which the streets and highways are dedicated. The following cases holding that such uses are limited to actual travel are consistent in deciding that the erection of poles and the stringing of wires constitute an additional servitude because this does not provide a method of travel, but to a degree interferes with the exercise of that right in so far as they may constitute an obstruction to any particular method of travel or transportation that may be employed, and is accordingly inconsistent with the use for public travel for which the particular highway is dedicated and is therefore an additional burden or servitude not included within the purposes of the dedication. This is the conservative theory, and is, of course, contrary to the position taken by the more progressive and increasing number of jurisdictions in holding that the highways are dedicated for the use of the public in communication as well as for actual travel and transportation, and that any method by which the public may substitute communication for transportation and thereby avoid the necessity of actual travel is a legitimate use of the highway and does not constitute an additional servitude on it because in effect it necessarily reduces travel and facilitates communication.

This conservative position is well stated by the North Dakota court in *Donovan v. Allert*, 11 N. Dak. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. 720, where it was said: "The primary use of a street or highway is confined to travel or transportation. Whatever the means used, the object to be attained is passage over the territory embraced within the limits of the street. Whether as a pedestrian, or on a bicycle, or in a vehicle drawn by horses or other animals, or in a vehicle propelled by electricity, or in a car drawn by horses or moved by electricity, the object to be gained is moving from place to place. The same

idea is expressed by courts and text writers, that 'motion is the primary idea of the use of the street.' * * * Neither the city council nor the legislature could deprive the plaintiff of compensation for his property rights in such lot, if the telephone poles set thereon are not a use of the street, within the purposes for which the easement was originally conveyed to the public."

§ 391. **Original dedication made the test.**—This same court in the case of *Cosgriff v. Tri-State Tel. & T. Co.*, 15 N. Dak. 210, 107 N. W. 525, 5 L. R. A. (N. S.) 1142, decided in 1906, extended its decision in the *Donovan* case by holding that the erection of poles and wires for a telephone system in a country highway constituted an additional servitude as well as in the streets of the municipality, and said: "The rights of a landowner whose land abuts upon a rural highway are not inferior to those of one whose land abuts upon the streets of a city. This is conceded. Indeed, it has been often held that the rights of the owner of land abutting upon the streets of a city are more restricted. This distinction, which is sometimes made, rests upon an alleged difference in the purpose of the original dedication.¹⁰ * * * The underlying principle which must govern is the same, however, in either case. The proposed use must be within the purpose of the original dedication. If it is not, it constitutes an additional servitude, whether it be of a street or rural highway. * * * Some courts have held that the primary and original purpose of the dedication of a street or highway includes the transmission of intelligence as well as public travel. These cases have the merit of being logical in their conclusion, for, adopting the view, which in our opinion is erroneous, that a street or highway is dedicated for use, both for travel and the transmission of intelligence, it follows necessarily that the maintenance of a telephone is not a new use, and this would also be true of any and all new modes of communication which ingenuity may devise."

A decision to this same effect is furnished by the Supreme Court of California in the case of *Gurnsey v. Northern California Power Co.*, 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185, decided in 1911, which is based on the theory that the use of such a highway for the transmission of electric light for private purposes is "for a purpose not incidental to the use of such highway [and] is inconsistent with the dedication of the highway and the use of the public. It constituted an additional

¹⁰ *Eels v. American Tel. & T. Co.*, R. A. 640; *Croswell, Electricity*, 143 N. Y. 133, 38 N. E. 202, 25 L. §§ 117, 126.

servitude upon the land of the plaintiff beyond the purpose of the dedication, and was an invasion of his property rights therein, for which he was entitled to redress." Because the abutting property owner had permitted the erection of the poles and wires, however, he was restricted in his recovery to the damages which he sustained and was not permitted to require their removal. This as the court said "is based mainly on the great principle of public policy, under which the rights of the citizen are sometimes abridged in the interest of the public welfare."

On the theory that the original dedication of the roadway determines the extent of the easement and the right of public service corporations to install their equipment, such equipment may not be placed beyond the original right-of-way without the consent of the adjoining property owner under the decision in the case of *Chesapeake & Potomac Tel. Co. v. Tyson*, 160 Md. 298, 153 Atl. 271, where the court said: "As owners of the fee in the roadway, the defendants have a valid ground of objection to the imposition upon the land of any servitude not resulting from agreement, prescription, or condemnation. The highway easement does not include the right of user by a public service corporation for its independent purposes. * * * The removal of the poles erected in positions beyond the lines of those originally occupied under the grant of 1918 should be required by decree under the defendant's crossbill, and the case will be remanded for that purpose."

§ 392. **Ownership of fee in street not considered.**—Decisions to the same effect by the Supreme Court of Ohio are furnished in the companion cases of *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782, and *Schaaf v. Cleveland, M. & S. R. Co.*, 66 Ohio St. 215, 64 N. E. 145, both of which were decided April 22, 1902. While the *Callen* case held that the construction in the streets of the necessary poles and wires for furnishing electric lighting for private use constituted an additional servitude, the case refused to make any distinction between the rural highway and the street which to this extent is in harmony with the prevailing rule. In the course of its decision the court said: "It would seem to follow from the foregoing that, for practical purposes, there is no substantial difference in the right of the owner of lands abutting upon a country highway in such highway, and that of the owner of a lot abutting on a city street in such street. In the one case, where the fee is in the landowner, his rights in and over the streets are in their nature legal, while, if the fee be in the pub-

lic, the lawful rights of the abutting owners are in their nature equitable easements. In both situations the right of the public is for road or street purposes, and is necessarily limited to such control as is necessary to accomplish those purposes. * * * The electric lighting by defendant is not of the streets and for the city. It is wholly for private use. Hence, it is a private purpose, and is not a street purpose, in any aspect of it. Its use of these streets is not such as was contemplated by the original dedication. On the contrary, the maintenance of its structures devolves new burdens upon the land—burdens calculated to materially impair the rights of the owner in the street.”

§ 393. Interurban in rural highway held additional servitude.

—This same court in the Schaaf case decided that the interurban railway operating at the side of the country highway immediately adjacent to the fields of the abutting property owner constituted an additional servitude not covered by the dedication in that it interfered with his right of access from the highway to his fields. The same wires and poles were used for the additional purpose of conveying electricity for light, power and heat to private consumers for profit, which the court held constituted an additional servitude in that it created a further interference with the property rights of the abutting owner. The decision is supported by the following argument which is characteristic of the cases holding that such uses constitute additional servitudes: “In our opinion, the construction and operation of the railroad, as authorized and proposed, must necessarily constitute a serious obstruction to the plaintiffs’ use of the public highway as a means of access to their farms, and an additional burden on the highway, not contemplated in its originally intended uses. The whole burden of the railway, with all of its authorized appurtenances, is thrown entirely upon the side of the public road next to the plaintiff’s lands, and between them and the traveled part of the roadway. The nature of that burden is not different in any material respect from that imposed by the construction and operation of a steam railroad. The difference, if any, is merely in the degree of the burden, and not in its character, and can scarcely be less in any degree. * * * And in addition to this, the company is given authority to erect and maintain on the same side of the public roadway, and next to the plaintiff’s lands, all poles, which are of large dimensions, and all wires and other appliances, necessary to enable it to operate an electric plant for supplying light, power, and heat to consumers, for profit. * * * All things considered, it is reasonably certain, from the facts

found, that the practical operation of such a road, within its capacity, must necessarily produce annoyance and inconvenience to the plaintiffs, and interfere with their property rights as abutting owners, of the same general character that result from the operation of steam railroads, and become an additional burden on the public highway, and taking of the plaintiffs' property, in the same sense. * * * And it is obvious, also that within this rule the construction and operation of an electric plant, with its appliances, in connection with such railway, and on the same side of the traveled public roadway, for supplying heat, power, and light to consumers for profit, constitutes another and additional burden, which is an invasion of the plaintiff's property rights."

That interurban railways carrying large freight shipments constituted an additional servitude as against abutting property owners is held in the case of *Anhalt v. Waterloo, C. F. & N. R. Co.*, 166 Iowa 479, 147 N. W. 928: "It was no doubt the thought of the legislature that street railways were for the transporting of passengers from point to point within the city, for the convenient use of the people of the city in moving from point to point, and that the burden imposed upon the street, the added servitude, ought to be borne without complaint, and without compensation, by the abutting property owners, but that where these interurbans sought the use of the streets for traffic, for carrying of freight, such as it was alleged this interurban was engaged in carrying, the added servitude was more, and the burden greater upon the street than abutting property owners ought to be required to bear. Hence, as to all the streets upon which these interurbans sought to depart from the ordinary business of a street railway, and engage in the business of commercial railways upon the streets, they ought to be required to make compensation to those affected by the added burden."

To the same effect an additional servitude was held imposed by interurban railways in the case of *Jefferson County v. Louisville & I. R. Co.*, 155 Ky. 810, 160 S. W. 502: "It is not to be supposed that the legislature of the state intended that railroad companies should appropriate to their own use so much of the public highways of the state as suited their needs. It is not to be presumed that the legislature, in the enactment of this statute, contemplated giving unlimited authority to railroad companies to run single or double tracks for miles, if they so desired, upon the public roads of the state, thus practically destroying the roads for the uses to which they were dedicated and set apart.

It appears in this record that 152 trains a day are run on this road between Louisville and Beechwood Junction, and it needs no argument to prove that running 152 trains each day on a public road greatly impairs the safety as well as the usefulness of the road for persons who travel in vehicles. The public highways of the state were primarily established for the use of travel on horseback and in vehicles of different kinds. They were not intended to be used lengthwise by railroad companies in the operation of their trains."

CHAPTER 17

EXEMPTION FROM TAXATION OF MUNICIPAL PROPERTY SUPPLYING MUNICIPAL PUBLIC UTILITIES

Section	Section
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415. Property exempt when ownership and purpose public.	

§ 400. **Municipal ownership facilitated by tax exemption.**—The facility with which a municipal corporation may increase its sphere of activity by assuming the operation of its own public utilities is largely affected by the attitude of the government toward the property devoted to these purposes as expressed in the law with regard to its taxation. For even where taxes are imposed with the single idea of securing revenue, which, of course, is usually the case, a municipality, whose municipal pub-

lic utility plants are not subject to either federal, state, or local taxation, can perform the desired service much more easily and at less cost to the consumer than it could were such property subject to taxation. The attitude of the courts with regard to the taxation of such municipal property, therefore, has an important bearing on the subject under consideration.

§ 401. **Power to tax under federal Constitution.**¹—This subject will be treated from the point of view of constitutional power and from that of judicial construction of existing statutes. Since the decision of the United States Supreme Court in the case of *State of South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 4 Ann. Cas. 737, it must be accepted as the law that the United States government has the power which it may exercise at will, to tax all business undertakings of municipal corporations. In this case it was held that the state dispensaries for the sale of liquor were subject to the tax imposed by the law of congress taxing the sale of liquor. As a matter of policy, however, such taxation is of very doubtful, practical expediency, and it has not and probably will not be frequently employed.

§ 402. **Taxation under state constitutions.**—There is also no doubt as to the power of the states, under the ordinary state constitutional provisions, to tax the property of municipal corporations. But generally in fact such constitutional provisions do not require the taxation of even what is regarded as the private property of municipal corporations. The court of Kentucky, however, adopted the other view of the constitution of that state on this subject.²

§ 403. **Municipal property used for governmental and private purposes.**—In considering the law as defined by the courts in the construction of statutory provisions on the subject, especially when enacted in the absence of pertinent constitutional provisions, it is very necessary to distinguish between the property of municipal corporations which is used for a distinctly governmental purpose and that which is used in connection with the operation by such corporations of a municipal public utility, for the distinction is made as to the use to which such property

¹ This section of third edition cited in *Jones and Bigham, Principles of Public Utilities*, 720.

² *Clark v. Louisville Water Co.*, 90 Ky. 515, 14 S. W. 502, *affd.* in

143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. 346; *Newport v. Commonwealth*, 106 Ky. 434, 50 S. W. 845, 45 L. R. A. 518.

is devoted—whether public and governmental in its purpose or private and primarily for profit.

§ 404. **Public governmental property not taxed.**—The rule of law is universally accepted by all our courts to the effect that public property and the instrumentalities of government, whether pertaining to the federal, state, or municipal government, which are used or held for public or governmental purposes, are not, in the absence of a statute to that effect, subject to taxation. Although this immunity from taxation is generally confirmed expressly by constitutional provisions or statutory grants it is based on one of the most fundamental principles of government and good business usages and, in the absence of any express provision, is generally implied by our courts from the necessity of preventing the functions and activities of government being interfered with or impeded. This principle is strictly adhered to for the further practical purpose of avoiding the useless and inconsistent formality of permitting the government to tax itself to pay itself money which could finally only be secured by other taxation.³

It is evident that aside from the expense of such a practice no benefit could accrue from such proceedings except to the taxing officers whose compensation would simply add so much more to the net amount necessary to be raised for the support of the government and its business activities.⁴

This principle, exempting from taxation municipal property together with the highly practicable reason on which it is based, is perhaps best stated in the leading case of *Foster v. Duluth*, 120 Minn. 484, 140 N. W. 129, 48 L. R. A. (N. S.) 707: "After its purchase by the city in July, 1905, the property was devoted to public uses, and became public property. It was not thereafter subject to taxation. This is conceded by plaintiff. It is technically inaccurate to say that it was exempt from taxation, for the term 'exemption' rather presupposes a liability removed by some constitutional or statutory provision. The property is 'exempt,' not because of any such provision declaring it exempt,

³ Georgia. *Cartersville Water Works Co. v. Cartersville*, 81 Ga. 689, 16 S. E. 70.

Maine. *Portland v. Portland Water Co.*, 67 Maine 135.

Michigan. *Alpena City Water Co. v. Alpena*, 130 Mich. 518, 90 N. W. 323.

New York. *People v. Assessors of Brooklyn*, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148; *Rochester v. Coe*, 25 App. Div. 300, 49 N. Y. S. 502.

Texas. *Altgelt v. San Antonio*, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383.

⁴ Cooley, *Taxation*, fourth edition, 263, and cases cited.

but because of its character as public property devoted to a public use. The property of the state and of its political subdivisions, arms, or agencies, such as cities within its borders, when used exclusively for public purposes, is not subject to taxation, in the absence of constitutional or statutory provisions making public property subject to the tax laws of the state. This is the undisputed rule; but it is no better established than is the proposition that proceedings for the assessments of taxes against public property, or for their collection by judgment and sale, are absolutely void. This is not only because the property was exempt from taxation, but because it was public property. A reason for the rule is that a sale of the property to enforce collection of taxes assessed against it would destroy its character as public property, to the public injury. The distinction is clear between property exempted from taxation by constitutional or statutory provisions, when such property would be subject to taxation in the absence of such provisions, as, for example, church property, institutions of public charity, or the property of corporations which pay a gross earnings tax, and public property used exclusively for public purposes, which would not be subject to taxation, though the constitution had not so provided. In the one case the property exempted is private property, which, for good reasons it is deemed wise or just to relieve from the burden of taxes that it would otherwise be obliged to sustain; in the other case the property is owned by the state, or by its agencies, is devoted to a public use, and is not subject to taxation for reasons that are different in character, among which may be suggested the fact that the taxation of public property owned by the state or its municipal divisions would mean that the state would be taxing itself in order to raise money to pay over to itself, and the reason, before suggested, that the collection of such taxes might result in destroying the public character of the property."

§ 405. **Municipal public utility property of municipality.**—While the authorities are uniform in exempting from taxation even by implication property held and used by the municipality for public and governmental purposes, all the courts can not be said to be of the opinion that property of municipal corporations, which is used by them in their private business capacity in furnishing such public utilities as gas, water, and electric light, is entitled to such exemption. In fact, as has been said, the

court of one jurisdiction formerly held a statute expressly exempting such property from taxation to be unconstitutional.⁵

§ 406. **Public purpose entitles municipal property to exemption.**⁶—It is submitted, however, that, if within the meaning of the constitution, the providing of these utilities is a public purpose and the property so used is devoted to a public trust, for the acquisition of which money may be raised by taxation because the purpose is a public or municipal one, the property so acquired and used should be entitled to exemption from taxation the same as other municipal property.

As a matter of reason if the purpose is such a municipal one that these plants of the city providing public utilities may be acquired and maintained by taxation, it remains public or municipal from the point of view of the law of taxation, and as a practical business principle, the taxing of such property, which may be acquired and maintained at the public expense by taxation, except as revenue may be derived from its use and operation, is simply taxing the property of the city for its own support with the necessary result that nothing of any net value to the city is acquired to offset the expense of such taxation.

This principle, exempting property used for irrigation purposes because they are public, and at the same time exempting persons without the irrigation district from the payment of taxes to support it, because they can not receive benefits from the irrigation district, furnishes an excellent illustration of the reason for exempting such property from taxation, because it is generally acquired entirely or in part from revenue raised by taxation and it serves a public purpose. This principle and the effect of its application in such a connection are clearly illustrated and fully discussed in the case of *Gallardo v. Porto Rico Light & Power Co.*, 18 Fed. (2d) 918, as follows: "Equally untenable is the holding of the court below that the tax is not imposed for a public purpose. To conserve and develop water resources, for domestic use, for irrigation, and for power and light, are common public uses. * * * The court below grounded its decision as to this point upon section three of the act, which contemplates possible profits, part of which are to go 'into regular funds of the insular treasury.' But this possibility of net revenue does not

⁵ *Clark v. Louisville Water Co.*, 90 Ky. 515, 14 S. W. 502, *affd.* in 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. 346.

⁶ This section (§ 322 of 2d edi-

tion) cited in *North Haven v. Wallingford*, 95 Conn. 544, 111 Atl. 904, and quoted in *Commonwealth v. Richmond*, 116 Va. 69, 81 S. E. 69, L. R. A. 1915A, 1118.

prevent the general purposes from being public. How far public service utilities shall derive revenue from rates (referred to in the New England Divisions case as taxes, 261 U. S. 184, 196, 43 Sup. Ct. 270, 67 L. ed. 605), and how far from ordinary tax levies, are pure questions of legislative expediency. *Meriwether v. Garrett*, 102 U. S. 472, 501, 26 L. ed. 197. The possibility of profit from such rates does not transmute a public utility into a private enterprise. Expense to the general taxpayer is not the test of public use. * * * Turning to the implied, underlying theory of the Water Power Act, it is clear that the legislature of Porto Rico regarded the development of water power as involving special and peculiar benefits to the lands of the island of Porto Rico, benefits not accruing, in the same general way, to personalty; that the detached islands were excepted from the burden because also prospectively excluded from the benefits. We can not say that this underlying theory is not sound and just. * * * But light, power, and water, made generally or largely available, might well increase the agricultural productivity of the lands and also make large areas better fit for wholesome and comfortable residence. * * * The logic of the plaintiff's position would exclude even exemptions, the validity of which it admits; so also as to classifications. In effect, the claim is for universality of taxation, not for uniformity, within the fair and generally accepted meaning of the term. But no principle of taxation is better settled than that uniformity does not mean universality. 37 Cyc. p. 740, and cases cited; 37 Cyc. pp. 734, 735, 736. The principle is stated in *Cooley's Constitutional Limitations* (5th ed.), p. 638."

§ 407. **Power to produce revenue not the proper test.**⁷—Nor should the fact that revenue may be derived from the operation of such plants by the city change the principle of their exemption from taxation, for in no sense can that fact alter the nature of the use to which such property is put nor the purpose accomplished by such use. And this is the proper test of its being a proper subject of support by taxation and of exemption from taxation. That revenue may be realized from such plants, tending to make them self-supporting, is no reason for subjecting them to the payment of taxation for their own support and that of the government to which they belong. This incidental matter of revenue does not change the nature of the use or purpose of such property from a public one and for municipal purposes

⁷ This section (§ 323 of 2d ed. Richmond, 116 Va. 69, 81 S. E. 69, tion) quoted in *Commonwealth v. L. R. A. 1915A, 1118.*

generally, to one that is wholly private and that is conducted for the sole purpose of pecuniary profit rather than for the general welfare, so as to make it liable to taxation, as is contended in some of the cases to which reference will be made.^a

^a **United States.** *State of South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. 110; *United States v. Whitridge*, 231 U. S. 144, 58 L. ed. 159, 24 Sup. Ct. 24; *Louisville Gas &c. Co. v. Coleman*, 277 U. S. 32, 72 L. ed. 770, 48 Sup. Ct. 423; *Utah Power &c. Co. v. Pfost*, — U. S. —, 76 L. ed. 739 (Adv. Sh.), — Sup. Ct. —.

Federal. *Bartholomew v. Austin*, 85 Fed. 359; *Puget Sound Power &c. Co. v. Seattle*, 5 Fed. (2d) 393, cert. denied in 269 U. S. 565, 70 L. ed. 414, 46 Sup. Ct. 24; *Seattle v. Puget Sound Power &c. Co.*, 15 Fed. (2d) 794; *Gallardo v. Porto Rico R. Light &c. Co.*, 18 Fed. (2d) 918; *Utah Power &c. Co. v. Pfost*, 52 Fed. (2d) 226; *South Carolina Power Co. v. South Carolina Tax Comm.*, 52 Fed. (2d) 515; *Utah Power &c. Co. v. Pfost*, 54 Fed. (2d) 803, affd. in — U. S. —, 76 L. ed. 739 (Adv. Sh.), — Sup. Ct. —.

Connecticut. *West Hartford v. Board of Water Comrs.*, 44 Conn. 360.

Florida. *Tampa v. Kaunitz*, 39 Fla. 683, 23 So. 416.

Georgia. *Tarver v. Dalton*, 134 Ga. 462, 67 S. E. 929, 29 L. R. A. (N. S.) 183, 20 Ann. Cas. 281.

Illinois. *Shelbyville Water Co. v. People*, 140 Ill. 545, 30 N. E. 678, 16 L. R. A. 505.

Kansas. *Sumner Co. v. Wellington*, 66 Kans. 590, 72 Pac. 216, 60 L. R. A. 850, 97 Am. St. 396.

Kentucky. *Louisville v. Commonwealth*, 1 Duv. (62 Ky.) 295, 85 Am. Dec. 624; *Clark v. Louisville Water Co.*, 90 Ky. 515, 14 S. W. 502, affd. in 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. 346; *Covington v. Commonwealth*, 107 Ky. 680, 39 S. W. 836, affd. in 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383; *Covington v. District of Highlands*, 113 Ky. 612, 68 S. W. 669, 24 Ky. L. 433; *Dayton v.*

Bellevue Water &c. Gaslight Co., 119 Ky. 714, 68 S. W. 142, 24 Ky. L. 194, 7 Ann. Cas. 1012; *Ryan v. Louisville*, 133 Ky. 714, 118 S. W. 992; *Board of Councilmen v. White*, 224 Ky. 570, 6 S. W. (2d) 699; *South Covington &c. St. R. Co. v. Henkel*, 228 Ky. 271, 14 S. W. (2d) 1068; *Negley v. Henderson*, 21 Ky. L. 1394, 55 S. W. 554, 22 Ky. L. 912, 59 S. W. 19; *Louisville v. McAteer*, 26 Ky. L. 425, 81 S. W. 698, 1 L. R. A. (N. S.) 766; *Frankfort v. Commonwealth*, 29 Ky. L. 699, 94 S. W. 648; *Commonwealth v. Paducah*, 31 Ky. L. 528, 102 S. W. 882.

Maine. *Maine Water Co. v. Waterville*, 93 Maine 586, 45 Atl. 830, 49 L. R. A. 294.

Massachusetts. *Wayland v. Board of County Comrs.*, 4 Gray (70 Mass.) 500; *Essex County v. Salem*, 153 Mass. 141, 26 N. E. 431; *Somerville v. Waltham*, 170 Mass. 160, 48 N. E. 1092; *Miller v. Fitchburg*, 180 Mass. 32, 61 N. E. 277; *Milton v. Boston (Mass.)*, 180 N. E. 116.

Michigan. *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558.

Minnesota. *Foster v. Duluth*, 120 Minn. 484, 140 N. W. 129, 48 L. R. A. (N. S.) 707.

Nebraska. *Nebraska Tel. Co. v. Lincoln*, 82 Nebr. 59, 117 N. W. 284, 28 L. R. A. (N. S.) 221.

New Hampshire. *Newport v. Unity*, 68 N. H. 587, 44 Atl. 704, 73 Am. St. 626.

New Jersey. *Water Comrs. v. Gaffney*, 34 N. J. L. 131; *Millville Water Co. v. Millville*, 86 N. J. L. 10, 90 Atl. 1097.

New York. *Rochester v. Rush*, 80 N. Y. 302; *People v. Brooklyn*, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148; *People v. Hess*, 157 N. Y. 42, 51 N. E. 410.

Ohio. *Toledo v. Yeager*, 6 C. D. 273, 8 Ohio C. R. 318; *State v.*

§ 408. **Nature of purpose not changed by income received.**—That public property yielding revenue is not a proper subject for taxation on that account is well illustrated in the case of *People v. Brooklyn*, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148, where the court passed upon the matter of the right of the defendant city to tax property within its limits belonging to the city of New York and used by such city for a landing place for its ferry which was being operated between different sections of the city. The reasoning of the court in refusing such right of taxation is as follows: "We think the landing place was not taxable, upon the principle that property used for public purposes, is not a taxable subject, within the purview of the tax laws, unless specially included. * * * There would be manifest incongruity in subjecting to taxation for public purposes property dedicated to or acquired under legislative authority for public and governmental use. * * * The fact that the city of New York operates the ferry through lessees, and derives its revenue from the rental, and not from the operation of the ferry by its immediate agents and servants does not make the franchise or the landing taxable. * * * The tax is imposed on the land as the property of the city, and not on the lessees in respect of their interest."

§ 409. **"Municipal purpose" defined.**—To this same effect is the case of *Somerville v. Waltham*, 170 Mass. 160, 48 N. E. 1092, which is of interest for the further reason that it assists in defining the scope of the term "municipal purpose" in connection with this matter of taxation. The court said: "There is nothing in our statutes to prevent a city or town from acquiring by purchase land in another city or town for municipal purposes, if it is necessary or expedient for the interests of its inhabitants to do so. * * * While there is no specific exemption from

Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; *Toledo v. Hosler*, 54 Ohio St. 418, 43 N. E. 583.

Pennsylvania. *Chadwick v. Maginnes*, 94 Pa. 117; *Commonwealth v. Philadelphia Rapid Transit Co.*, 287 Pa. 70, 134 Atl. 452.

Tennessee. *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469.

Texas. *Bexar - Medina - Atascosa Counties Water Improvement Dist. No. 1 v. State (Tex.)*, 21 S. W. (2d) 747.

Vermont. *Swanton v. Highgate*, 81 Vt. 152, 69 Atl. 667, 16 L. R. A. (N. S.) 867.

Virginia. *Southern Bell Tel. & T. Co. v. Harrisonburg*, 111 Va. 494, 69 S. E. 348, 31 L. R. A. (N. S.) 327; *Commonwealth v. Richmond*, 116 Va. 69, 81 S. E. 69, L. R. A. 1915A, 1118; *Warwick County v. Newport News*, 153 Va. 789, 151 S. E. 417.

Wisconsin. *Monroe Water Works Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685.

taxation in Pub. St. ch. 11, § 5, of the property of counties or municipal corporations, yet it is well settled that such property, when appropriated to public uses, is exempt from taxation. * * * As the land in question was purchased for the purpose of obtaining therefrom gravel for the construction and repair of streets in the plaintiff city, and has since been used for that purpose, we have no doubt that it is appropriated to public use, and is exempt from taxation."

§ 410. **Present use must be public.**—That property which had been purchased for the purpose of some time being used for enlarging the jail in a certain town, but which had not been actually appropriated to that purpose and was being rented to private parties, will not be held exempt from taxation by implication, because it is not devoted to a public use, was the decision in the case of *Essex County v. Salem*, 153 Mass. 141, 26 N. E. 431. In this case the court stated this limitation on the general principle as follows: "We are of the opinion that, in the absence of any express exemption of the property of counties from taxation, an exemption can be implied only when the property is actually appropriated to public use."

While municipal property which is being devoted to a public use is generally exempted from taxation for that reason, even in the absence of any statutory provision to that effect, such exemption is not available to municipal property which is not being used or held for public purposes, especially where the property is located within the borders of another municipality, for as the court said in the case of *Milton v. Boston* (Mass.), 180 N. E. 116: "The purpose of St. 1923, c. 480 (under which the defendant made the taking of the real estate here assessed), as expressed in its title, was to provide for the extension of the rapid transit facilities in the Dorchester District of Boston. Examination of the several sections of the statute confirms the accuracy of the title in its description of its end and aim. The taking of land for that purpose constitutes a public use. Property taken or held for a public use by one municipality within the territorial limits of another or within its own boundaries is not subject to taxation so long as it is actually devoted to a public use. The reason is that property held and used for the benefit of the public ought not to be made to share the burden of paying the public expenses. That exemption does not rest on any provision of statute, but is founded on general principles of expediency and justice. * * * The exemption from taxation, in view of the principle on which it rests, can not justly be extended to property owned by one

municipality within the bounds of another, not actually devoted to a public use or held with the design within a reasonable time to devote it to such use. *Essex County v. Salem*, 153 Mass. 141, 26 N. E. 431; *Burr v. Boston*, 208 Mass. 537, 540, 95 N. E. 208, 34 L. R. A. (N. S.) 143. Therefore, a tax upon the building in which the upper tenement has been rented for private use for many years, both before and after the taking by the defendant, was justified. *South Congregational Meetinghouse in Lowell v. Lowell*, 1 Metc. 538. We are of opinion that the same conclusion must be reached as to the tax on the two vacant parcels of land."

§ 411. **Waterworks a public purpose.**—With reference especially to the matter of the exemption from taxation of municipal property devoted to the supplying of such public utilities as gas, water, and electric light for the city and its citizens, the following cases are discussed to illustrate the principle of law involved. The case of *Wayland v. County Comrs.*, 4 Gray (70 Mass.) 500, decided in 1855 that lands taken by the city of Boston under an act, Statutes, Massachusetts, 1846, ch. 167, for supplying that city with water, were not liable to taxation within such city. The court indicated its position by saying: "Regarding this land as taken and holden for the public use, and the buildings erected upon it as necessarily incident to such use, they are both to be held public works, and as such exempted from taxation. * * * It can only be on the ground that this land was taken for public uses, that the exercise of the right of eminent domain by the government can be justified. * * * It would be difficult, we think, to find any class of cases in which the right of eminent domain is more justly or wisely exercised than in provisions to supply our crowded towns and cities with pure water—provisions equally necessary to the health and safety of the people."

§ 412. **Purchased by taxation and under eminent domain.**—This principle, which is firmly established in the law and supported by good sense and good business principles, was clearly enunciated by the court of New York in 1880, in the case of *Rochester v. Rush*, 80 N. Y. 302, as follows: "The property assessed forms a part of a system of waterworks, imposed upon the city of Rochester by direct legislative enactment * * * for the use of its inhabitants, and the extinguishment of fires * * * and the work undertaken in pursuance of its directions must be regarded as executed for the public good, and the property therefore held for public purposes. It is itself the result or product

of taxation. It stands in the place of the money so raised, and therefore can not be taken or diminished by taxation. This is clearly so upon principle, but it is also well settled by authority.

* * * I am unable to perceive that in any sense the waterworks can be regarded as the private property of the city as distinguished from property held by it for public use. These considerations lead to the opinion that the property was not taxable, and that the proceedings on the part of the assessors of the town of Rush, in regard thereto, can not be sustained."

This case is in harmony with the great weight of authority on this subject and its reasoning has commended itself to almost all our courts. In so far, however, as the court refused the right of one municipality to tax the property of another within its limits, although devoted to such a public use as the furnishing of water to its inhabitants, the law of this jurisdiction has been changed expressly by statute as appears from the case of *People v. Hess*, 157 N. Y. 42, 51 N. E. 410, which decided in 1898 that the property belonging to the waterworks system of the relator, the city of Amsterdam, located in the town of Perth was subject to taxation. The court explained its decision by saying: "It is conceded that prior to this statute, chapter 908 of the Laws of 1896, the property assessed was not liable to taxation, as it was held by a municipal corporation for public use. This exemption rested on no statutory provision, but upon a principle of the common law supported by numerous cases in England and this country. We are of the opinion the Tax Law of 1896 has changed this rule and that property held by a municipal corporation for public use, but located beyond the boundaries of the municipality is subject to general taxation."

§ 413. **Property beyond limits of municipality may be taxed.**—This limitation on the immunity from taxation of municipal waterworks property, as made expressly by statute, was fully accepted as binding on the court. The right of the legislature to tax such property of the municipality has not been doubted, although the expediency of doing so for the general purposes of taxation may be open to question. Where a large portion of such property is within the limits of another town or city the courts, under statutory provision for doing so, concede that the latter taxing district is entitled to revenue from such property in the form of taxes, and the cases of *Newport v. Unity*, 68 N. H. 587, 44 Atl. 704, 73 Am. St. 626, and *Miller v. Fitchburg*, 180 Mass. 32, 61 N. E. 277, so hold. This same limitation would seem to have been intended by the statute of New Jersey and accepted

by the court in its decision of this question in *Water Comrs. v. Gaffney*, 34 N. J. L. 131. The statute in question provided that: "All real estate belonging to the mayor and common council of Jersey City, and held within the county of Hudson for purposes connected with the works for supplying said city with water shall hereafter be exempt from taxation." In holding such property within said county not liable for taxation the court said: "It is true that the property was not in actual use when the assessment was made, but there was then no indication of any abandonment of the purpose to use it for a reservoir; on the contrary, it is clear that it was held for that necessary purpose, and without being used for any other."

§ 414. **Property beyond limits taxable only under statutory provisions.**—General exemption of property without any limitation as to location was allowed as early as 1877 in the case of *West Hartford v. Board of Water Comrs.*, 44 Conn. 360, and this rule seems to prevail still in the particular jurisdiction. The action arose out of an attempt on the part of the plaintiff municipality to tax that part of the waterworks property of the city of Hartford which was within the territory of the former city. In refusing this right the court said: "The [defendant] board of water commissioners are authorized by the legislature to purchase and hold land in the town of West Hartford for the purpose of storing water and carrying it thence to the city of Hartford for the use of its inhabitants. * * * Money in the keeping of a municipality as the result of the exercise of its power of taxation, for one public use, is not to be made to pay tribute to another public use. It has ceased to be taxable property in any legislative or judicial sense. The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably * * * for the public good in the judicial sense of that term; not, indeed, as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order. * * * Besides the fact that rents at the present time are sufficient to pay the annual charges may be only a fortunate occurrence; this state of things may not continue [and does not make its property subject to taxation]."

The same principle was followed by the court of Ohio, in 1894, in the case of *Toledo v. Yeager*, 6 C. D. 273, 8 Ohio C. R. 318, as applied to a municipal gas plant. The constitution of that state provided that, "public property used exclusively for any public purpose may by general laws be exempted from taxation."

After finding the use of this property to be public on the

authority of the decision of the case of *State v. Toledo*, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729, the court held that under this case the legislature had the authority to exempt this property from taxation and that it had done so. The court concluded its decision by saying: "The evidence shows this property to be devoted to the very purposes which are named in the statute, and which the Supreme Court has declared to be public purposes."

These decisions were sustained and the principle was given application in exempting from taxation municipal property used to supply natural gas to the municipality and its inhabitants by this court in the later case of *Toledo v. Hosler*, 54 Ohio St. 418, 43 N. E. 583, where the court said: "The constitutional restriction upon the power to exempt property from taxation requires that the exempted property must be used exclusively for a public purpose. That the property in question is so used is determined in *State v. City of Toledo*, 48 Ohio St. 112, 26 N. E. 1061."

§ 415. Property exempt when ownership and purpose public.—In 1903 this principle of exemption was clearly and fully enunciated by the court of Kansas in the case of *Sumner Co. v. Wellington*, 66 Kans. 590, 72 Pac. 216, 60 L. R. A. 850, 97 Am. St. 396, where the following language was used: "The supplying of water to the inhabitants, while not strictly a governmental function, so much affects the health and welfare of the people as to be closely akin to it. * * * The ownership and the purpose being public, there are good reasons why the property should be exempted from taxation. * * * The statute makes public ownership of property the ground of immunity from taxation, and as the plant in question is absolutely owned by the city, it is strictly within the terms of that exemption. The fact that, in establishing and carrying on a system of waterworks, the city furnishes water to citizens and consumers for rental charges, does not make it a mere business enterprise nor does it affect the exemption. The earnings derived from the water furnished for domestic use and to consumers is [are] as we have seen, paid into the city treasury, and used in carrying on the city government and thus inures [inure] to the benefit of the people of the municipality."

Under the constitution of Texas "public property used for public purposes" may be exempted from taxation by statute. Under this constitutional provision and pursuant to statutory authority enacted according to its provisions, the court of this state

decided that property of a water district which was necessary for the distribution of its water service was properly exempt from taxation in the case of Bexar-Medina-Atascosa Counties Water Improvement Dist., No. 1 v. State (Tex. Civ. App.), 21 S. W. (2d) 747, where the court said: "The only issue in this cause is: Has Medina county the power and authority to assess and collect taxes, state and county, on the dams, reservoirs, canals, ditches, and other property necessary for the conservation and distribution of waters in the district. It is provided by article 8, section 2, of the Constitution of Texas, that the legislature may by general laws exempt from taxation public property used for public purposes, and in pursuance of that authority enacted Rev. St. 1925, art. 7150, in section 4. * * * The district is not an ordinary corporation organized for purposes of gain to its members, but is a public agency, using the money raised by taxation to advance the interests of the landowners within its jurisdiction. * * * The law organizing water improvement districts brings them clearly within the purview of the definition given and places them within the meaning of 'political districts' exempted by the constitution of the state. * * * The question herein considered has never been directly before any Texas court before, although numerous opinions have treated water improvement districts as state agencies and political divisions of the state. The attorney general's department of the state, in two instances at least, has answered questions involving the issue in this case, and in each instance held that such agencies were not subject to taxation."

§ 416. **Payment for service same as payment of taxes.**—To a like effect is *Smith v. Nashville*, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469, where the court in upholding the exemption of municipal waterworks from taxation said that the power "to provide the city with water by waterworks," is very broad and comprehensive, and was obviously intended to authorize the corporation to furnish the inhabitants of the city with water. Having accepted the charter, and undertaken to exercise this authority in the manner detailed by the witness, it can not be held that the city in doing so is engaging in a private enterprise, or performing a municipal function for a private end. It is the use of corporate property for corporate purposes in the sense of the Revenue Law of 1877. It can make no difference whether the water be furnished the inhabitants as a gratuity or for a recompense, the sum raised in the latter case being reasonable and applied for legitimate purposes. So raising a fund to help defray

the expense of operating the waterworks, and to keep down the interest of the city's indebtedness, incurred in the construction thereof, is no more engaging in business for gain and profit than would be the assessment and collection of taxes for that or any other legitimate object. To the extent that money is realized by sale of water, if it be so termed, the necessity of laying taxes in the usual way is diminished."

In sustaining a contract of the city for its water supply to be paid for by its exempting the private company providing this service from taxation to the extent of the cost of such service, a very practical application of this principle of taxation is furnished in the case of *Millville Water Co. v. Millville*, 86 N. J. L. 10, 90 Atl. 1097: "These were contracting parties, their object was that the company should furnish an annual supply of water to the city, and that the city should make an annual compensation therefor to the company. As the increased supply from time to time would go hand in hand with a like increase in taxes, the compensation agreed upon was not a fixed and stationary sum, but a flexible one, to wit, the amount of the annual tax due to the city. That this was the compact is plain, and, had the contract said 'a sum equal to the amount of taxes,' etc., there could have been no contest over the meaning or legality of such an agreement. In my judgment, the words employed do not prevent our giving to them this meaning which the parties evidently had in mind, notwithstanding that the other meaning is, on the mere face of the contract, the more plausible. We have, however, more than the mere face to consider, we have: First, the situation of the parties and what they were both striving to accomplish; second, we have the presumption that the city was acting honestly and meant to live up to the consideration it was holding out to the company; thirdly, we have the criterion that the agreement was between contracting parties, and not between a taxing power and a subject of taxation acting in that capacity; and lastly we have the practical construction placed in the meaning and intent of this contract by both parties for a period of thirty-five years. During all these years the city has said annually to the company: 'Our understanding of our agreement is that each year we are to pay you for water the precise sum that we require you to pay us for taxes.' This was the meaning of the bargain when made, and would still, under nonlitigious conditions, continue to be its meaning to all fair-minded people; hence, in our opinion the complaint should not be stricken out."

§ 417. **Kentucky rule as to municipal property.**—This sound, legal and business principle, exempting from taxation municipal property devoted to the public use of supplying the city and its inhabitants with municipal public utilities, has been denied application and refuted as unsound by decisions of the court of Kentucky. The case of *Louisville v. Commonwealth*, 1 Duv. (62 Ky.) 295, 85 Am. Dec. 624, decided in 1864, shows the attitude of that court to be a peculiar one. In the course of its decision on this subject of tax exemption the court defined its position by saying: "Whatever property, such as courthouses, prisons, and the like, which becomes necessary or useful to the administration of the municipal government, and is devoted to that use, is exempt from state taxation; but whatever is not so used, but is owned and used by Louisville in its social or commercial capacity as a private corporation, and for its own profit, such as vacant lots, market houses, fire engines, and the like, is subject to taxation."

§ 418. **Distinction between public and governmental property invalid.**—That this should not be the law is beyond question for the application of such a rule might result in the total destruction of cities by doing away with their fire departments in permitting their sale for nonpayment of taxes. The position of this court can not be defended from the standpoint of law or reason and its practical application would be highly dangerous. Speaking of this decision, Judge Cooley, in his excellent work on Taxation, said, page 267: "But this, unless confined to the case of special assessments, would seem to be limiting the implied exemption unreasonably, and certainly more than other cases limit it."

This principle exempting municipal property from taxation when used for public purposes even for profit is well stated in the leading case of *Commonwealth v. Richmond*, 116 Va. 69, 81 S. E. 69, L. R. A. 1915A, 1118: "This contention is rested upon the ground that from each, 'the auditorium building, the markethouses, the waterworks, and the gasworks, the city habitually receives and collects a net revenue largely in excess of the cost of maintaining these utilities, all of which is covered into the treasury of the city and used for its general purposes, which * * * renders each and every one of those properties liable to taxation under the express provision of the constitution.' It is conceded in the argument here that the city of Richmond, under its charter, is authorized to own and operate the gasworks, waterworks, markethouses, and an auditorium, which are sought to be taxed in this case, and that these different properties and utilities

are 'lawfully owned' by the city, and like all other property owned by it are used for city purposes; but it is insisted that, though these properties and utilities be held and used for a 'governmental purpose,' whenever the city derives for such use a revenue or profit to be used in effecting the other public functions or purposes of the city, 'such properties or utilities cease to be exonerated from taxation by the state.' * * * Under section 3, article 10, of the Constitution of the state prior to our present constitution, legislative action was necessary to exempt certain classified property from taxation. The present constitution—subsection 'a,' section 183 (Code 1904, p. cclxvii)—is self-operative, and in effect exempts certain properties, among them 'property directly or indirectly owned by the state, however held, and property lawfully owned and held by counties, cities, towns and school districts used wholly and exclusively for county, city, town or public school purposes,' etc. Subsections of section 183 following exempt certain other classes of property from taxation, putting limitations upon the right to the exemptive conditions, among them that property exempted shall be lawfully owned and used wholly for the purposes for which the property was acquired and owned. * * * The rule of construction of the provisions of section 183 of the Constitution, applied in the case⁹ just quoted from, upon sound reasoning as well as upon authority, applies with greater force where the property sought to be taxed is lawfully owned and used by a municipality which is but a part of the state, exercising for specific purposes a portion of the sovereign power delegated to it, the municipality being but a political subdivision of the state, and such property stands related to the commonwealth as its own. *Black v. Sherwood*, 84 Va. 906, 6 S. E. 484. * * * The exemptions from taxation provided for by section 183 of the Constitution of property lawfully owned and held by a city wholly and exclusively used for city, county, town, charitable, educational, or religious purposes, are not defeated or annulled by the mere fact that revenue or profit, over and above the cost of maintenance, is realized from the property. If the use made of the property so held has direct reference to the purposes for which it is by law authorized to be owned and held, and tends immediately and directly to promote those purposes, then its use is within the provisions exempting the property from taxation, although revenue or profit is de-

⁹ *Commonwealth v. Lynchburg Y. M. C. A.*, 115 Va. 745, 80 S. E. 589, 50 L. R. A. (N. S.) 1197.

rived therefrom as incident to such use. * * * Prof. Pond, of Columbia University, in his recent and admirable work on Public Utilities (sections 322 and 323), says:" (quoted in full).

§ 419. **Municipal waterworks under Kentucky rule.**—The court of Kentucky in 1890, in the case of *Clark v. Louisville Water Co.*, 90 Ky. 515, 14 S. W. 502,¹⁰ held unconstitutional a statute of that state exempting from taxation all of the property of the defendant company, the entire stock of which was owned by the city of Louisville. The court found that, "the first section of our Bill of Rights provided that 'no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public service.' We think it evident that the furnishing of water by the company to the city for fire protection free of charge was not what induced the passage of the act. * * * The reason which induced the attempted granting of the exemption must, therefore, have been, as indeed the act recites, that the sinking fund of the city, or, in other words, the city itself, owned all the water company stock. The question, therefore, is, did the fact that the sinking fund, or, in other words, the city, owned the water company stock, constitute a valid consideration for the exemption? A municipal corporation has a double character. In one it acts strictly in its governmental capacity. In the other for the profit or convenience of its citizens. Considered in the latter light, it occupies the attitude of a private corporation merely, while in the former it is an arm of the state government or a part of its political power. * * * The property necessary to the exercise of those duties which are strictly governmental is exempt from taxation, but this is not so of that which is held by the municipality for the comfort of its citizens, individually or collectively, or for money-making purposes merely. * * * The fact that the furnishing of water may incidentally protect from fire the public buildings of the state will not support the exemption."

The law of this case was followed and extended to a general application of this rule denying the right of exemption to such property in the case of *Covington v. Commonwealth*, 107 Ky. 680, 39 S. W. 836,¹¹ decided in 1897. This decision was affirmed in 1900 in *Negley v. Henderson*, 22 Ky. L. 912, 59 S. W. 19, 21 Ky. L. 1394, 55 S. W. 554. And while on appeal the judgment of this first-mentioned case was not reversed, the Supreme Court of the United States said: "However much we may doubt the

¹⁰ Affirmed in 143 U. S. 1, 36 L. ed. 53, 12 Sup. Ct. 346.

¹¹ Affirmed in 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383.

soundness of any interpretation of the state constitution implying that lands and buildings are not public property used for public purposes when owned and used under legislative authority by a municipal corporation, one of the instrumentalities or agencies of the state, for the purpose, and only for the purpose, of supplying that corporation and its people with water, and when the net revenue from such property must be applied in the improvement of public ways, we must assume, in conformity with the judgment of the highest court of Kentucky, that section 170 of the Constitution of that commonwealth can not be construed as exempting the lands in question from taxation. In other words, we assume that the phrase 'public purposes' in that section means 'governmental purposes,' and that the property here taxed is not held by the city of Covington for such purposes, but only for the 'profit or convenience' of its inhabitants, and is liable to taxation, at the will of the legislature, unless at the time of the adoption of the constitution of Kentucky, it was exempt from taxation in virtue of some contract, the obligation of which is protected by the Constitution of the United States."

This court reaffirmed and continued to follow the Clark case in *Louisville v. McAteer*, 26 Ky. L. 425, 81 S. W. 698, 1 L. R. A. (N. S.) 766, decided in 1904, although it expressly appeared that "the city owns all its stock, or did own all but one or two shares for the years in question," and that "the plan is and has been to operate the plant so as to place the price of water to consumers at the lowest possible figure," for as the court said: "Property owned by or on behalf of the public, but not used for public purposes, is not exempt. * * * But although its stock is owned by the city, and the property is used in supplying the citizens water, the waterworks are not 'used for public purposes,' within the meaning of section 170, *supra*, and are subject to taxation for state and county purposes."¹² * * * Only those who consume its water pay for it. Many thousands of citizens who are taxpayers do not patronize the water company at all, but depend for their water supply on private wells and cisterns, or upon the public wells. If the water company is compelled to pay a municipal tax, it must collect the money with which to pay it, not by taxation, but from its water rates—from its customers. This will result in those who use that water paying a slightly increased rate for it."

¹² *Louisville v. Commonwealth*, 1 Duv. (62 Ky.) 295, 85 Am. Dec. 624; *Clark v. Louisville Water Co.*, 90 Ky. 515, 14 S. W. 502, *affd.* in 143

U. S. 1, 36 L. ed. 55; 12 Sup. Ct. 346; *Negley v. Henderson*, 21 Ky. L. 1394, 55 S. W. 554, 22 Ky. L. 912, 59 S. W. 19.

In reversing the case of *Covington v. Commonwealth*, 107 Ky. 680, 39 S. W. 836,¹³ and the subsequent cases which followed the rule therein announced, this court in the case of *Frankfort v. Commonwealth*, 29 Ky. L. 699, 94 S. W. 648, decided in 1906, said: "If each municipality in its prescribed sphere is imperium in imperio and administers the law for Kentucky, it is difficult to understand why it should be required to pay taxes to the state and county on property held for public purposes, any more than the city should require the county and state to pay taxes on property held by them situated within the municipality. * * * This being true, it would seem that, when taxes can be levied and collected for public purposes only, then the property acquired, with the taxes thus levied and collected, should be regarded as acquired and used for public purposes. Municipalities have no funds except those arising from the levy and collection of taxes. They are necessarily levied and collected for public purposes. The property which they are authorized to acquire of necessity must have been acquired with the money derived from the levy and collection of taxes, and must necessarily be regarded as held acquired for public purposes. * * * The legislature authorizes municipalities to levy and collect taxes for the purpose of building and maintaining waterworks and lighting plants. They are acquired for public purposes and maintained for public purposes. They are paid for with money that arises from the levy and collection of taxes which can only be levied and collected for public purposes. * * * Therefore the legislature has recognized waterworks and lighting plants as public necessities. * * * We rather base our conclusion upon the fact that the municipality, by reason of its agency of the state government, is required to look after the health of its citizens, and it supplies water to them for compensation as the best means of accomplishing that purpose, and that any excess of income over the expenses of maintaining the waterworks goes, not to the municipality in its private capacity, but to it in its public capacity, for the relief of the citizens of public burdens."

This decision was affirmed in 1907 in *Commonwealth v. Paducah*, 31 Ky. L. 528, 102 S. W. 882. And finally this court, in 1909, in the case of *Ryan v. Louisville*, 133 Ky. 714, 118 S. W. 992, said: "In the case of *Bell v. Louisville Water Company*, 106 S. W. 862, this court held that the same property was subject to taxation because the title was at that time vested in a corpo-

¹³ Affirmed in 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383.

ration known as the Louisville Water Company, although the whole of the capital stock of that company was owned by the city of Louisville. Immediately following the decision in that case, the water company paid all taxes then due or claimed, together with the interest and penalties resulting from their previous nonpayment. Since that time, however, and prior to September 1, 1908, the entire waterworks plant, its franchise, and effects were transferred and conveyed by the Louisville Water Company to the appellee city of Louisville, and the title thereto, at the time it would have been assessed by appellant but for the injunction preventing its assessment, was vested in the city of Louisville. * * * Conceding the transfer of the property to the city to be valid, does that relieve it from the burden of taxation? The question must be given an affirmative answer, unless this court should conclude to overrule numerous * * * cases, in which it was held that such property can not be taxed, because relieved of that burden by section 170 of the Constitution, which declares: 'There shall be exempt from taxation public property used for public purposes.' As the city of Louisville is but a political subdivision of the state, and may under its charter own and maintain, for the health, safety, and comfort of its inhabitants, the system of waterworks to which it has legally acquired title, such use of the property, being a use for public or governmental purposes exclusively, exempts it from taxation. This conclusion is so well supported by the subjoined list of authorities that further discussion of the matter would be a work of supererogation."¹⁴

§ 420. **Limitation denying right to sell for nonpayment of taxes.**—It should be noted, however, that this court in *Covington v. District of Highlands*, 113 Ky. 612, 68 S. W. 669, 24 Ky. L. 433, 68 S. W. 669, in following the law enunciated in the *Clark* case, *supra*, denied the right to sell the municipal waterworks property for nonpayment of taxes assessed against it; but provided that, in case of failure to make such payment, a receiver for the property might be appointed to collect funds with which to make such payment. While this may indicate the desire of this court to show some consideration for the preservation of the integrity of such a system, in the interest of the public which

¹⁴ *Owensboro v. Commonwealth*, 105 Ky. 344, 49 S. W. 320, 44 L. R. A. 202; *Commonwealth v. Covington*, 128 Ky. 36, 107 S. W. 231, 14 L. R. A. (N. S.) 1214; *Frankfort v.*

Commonwealth, 29 Ky. L. 699, 94 S. W. 648; *Covington v. District of Highlands*, 33 Ky. L. 323, 110 S. W. 338, 18 L. R. A. (N. S.) 1182.

is absolutely dependent upon its continued operation, it is submitted that the effect of a receiver in the great majority of cases would be fatal to the successful continuation of such a system, and would result in its final dissolution and destruction.

This same court in a later case distinguished municipal property held for municipal purposes from that held for proprietary or business uses, and held that such municipal property is exempt from taxation and may not be sold to satisfy municipal debts. This principle and the distinction between municipal and business purposes of municipalities are clearly pointed out in the case of *Board of Councilmen v. White*, 224 Ky. 570, 6 S. W. (2d) 699, where the court spoke as follows: "Illustrations of a strictly municipal purpose, as distinguished from a governmental purpose, are the construction and operation of municipal waterworks and the providing for the lighting of streets and, incidentally, the furnishing of lights to private individuals, and also provisions for the sprinkling of streets for sanitary purposes.

* * * It is now the settled law in this jurisdiction that property of a municipality acquired and necessary to the discharge of strictly local municipal purposes under classification (2), supra, for which authority is conferred by the municipal charter, is held by it for a public purpose and is exempt from taxation. That being true, it would appear to necessarily follow that the same property would likewise be exempt from appropriation to the satisfaction of the debts of the municipality."

§ 421. Income producing property—Taxation—Pennsylvania and Virginia.—The court of Pennsylvania, as early as 1880, in *Chadwick v. Maginnes*, 94 Pa. St. 117, denied the right of a municipal waterworks plant to exemption from taxation under a statute subjecting to taxation all property not expressly exempt, and especially property from which any income or revenue is derived. In this decision the court found that: "While the plaintiffs in error are in one sense a public corporation, the profits and benefits enure specially to the citizens of the South Ward, even to the extent it may be of relieving them from municipal taxes. Surely it was never intended that such a corporation should be exempt from all taxation, while others are compelled to bear their share of the public burden." While the law of this case is unsound under practically all the authorities we have found, it is the legislature rather than the court that is responsible for the inconsistent position taken by this case. In providing that all property not expressly exempt and especially

that from which any revenue is derived should be taxable, it is submitted that an erroneous distinction was made for the classification, for, under the argument advanced earlier in this discussion and by the cases cited, the fact that revenue is realized from municipal property is not a sound basis for subjecting it to taxation.

This same court in a later case reiterated its position in passing upon the validity of a statute attempting to exempt municipal property from taxation when used in carrying passengers for hire. In the case of *Commonwealth v. Philadelphia Rapid Transit Co.*, 287 Pa. 70, 134 Atl. 452, it said: "Granting the right to tax the municipality where its property is not engaged in carrying on its governmental functions, but is used for gain, we are confronted with the question whether the legislature has expressly imposed such a charge here by section 23 of the Act of 1889. * * * The corporate body, which was engaged in the carrying of passengers for hire, and, as a result, collecting fares, was the object sought to be reached, and the defendant was of that class, and comes within the terms used."

While admitting that municipal property used for public purposes is exempt from taxation, and that the municipality may extend its public utility service beyond its municipal limits, the court of Virginia denied that all municipal property is exempt from taxation as such, and held that a municipal waterworks system which is not used exclusively for public purposes and is a source of revenue and profit for the city, could not be properly exempted from taxation; for as the court said in the case of *Warwick County v. Newport News*, 153 Va. 789, 151 S. E. 417: "It is, of course, generally true that property owned by a city and used for public purposes is exempt from taxation. * * * It is undoubtedly true that a city may supply limited quantities of water to persons outside of the city as a mere incident to the enterprise as a whole, and certainly when the total amount is as small as that shown in the *Richmond City* case it may be treated as inconsequential, and the property will nevertheless be exempt from taxation as devoted wholly to municipal purposes. * * * Unquestionably it seems far better that the city of *Newport News* should own this water supply and operate the plant for the benefit of all the people of the city as well as of those living in the contiguous territory than that it should be owned and controlled by an independent public service corporation, or by several corporations. That the General Assembly recognized this in the passage of the act here involved seems to

be apparent. * * * Manifestly it does not mean that merely because the property is owned by a city it is therefore exempt from taxation. This is true of property owned by the commonwealth, but untrue of property owned by a city, for this depends upon the use to which it is devoted. * * * Our conclusion is that the property is liable to taxation because it is not used either wholly and exclusively for the public purposes of the city of Newport News, and that, having the right to charge reasonable rates, it should be a source of revenue and profit to the city of Newport News, a very substantial part of such profit being derived from the consumers of water outside of the city of Newport News, to whom the city owes no other duty than that which it assumed under the Act of 1926. * * * Our conclusion, then, is that the order of the trial court exempting the property from taxation by the county of Warwick for the tax year 1927 is erroneous, and therefore it will be reversed."

§ 422. Property providing private service taxed in Vermont.

—The court of Vermont, however, in the case of *Swanton v. Highgate*, 81 Vt. 152, 69 Atl. 667, 16 L. R. A. (N. S.) 867, decided in 1908, contrary to the general rule, that under the statutes of that state municipal property located in different taxing districts and supplying light for public and private use was not exempt, for in furnishing the private supply the use was not public within the meaning of the particular statutory provision. In the course of this unusual decision the court said: "The plaintiff claims that said property was exempt from taxation because used for a public use within the meaning of the statute exempting property thus used. The property was then used, and is still used, to light the plaintiff's streets, to supply its inhabitants and their public buildings with lights, to light the streets and supply the inhabitants and the public buildings of that part of the physical village of Swanton that is without the corporate limits of the plaintiff, and within the town of Swanton, and, in like manner to light the streets and supply the inhabitants of the villages of Highgate Center and Highgate Falls in the town of Highgate. * * * The rest of the property was put to a mixed use, partly public and partly private, with no way of telling how much was put to either use, and therefore the whole was taxable."

§ 423. Property of private parties taxable.—Where the property providing municipal public utilities is private and not owned by the municipality itself it can not be exempt from taxation,

because it is not public property, being used for a public or municipal purpose, but it is private property invested for profit. An agreement of a municipality with the municipal public utility owned and controlled by private capital exempting its property from taxation as such is invalid for the reason that it is beyond the power of the municipality to exempt such property from taxation, unless power to do so has been clearly and expressly conferred on the municipality by the legislature, acting within constitutional authority.

Private property used in the production of electricity and the production of electrical energy is a proper subject for taxation by the state, as was indicated in the case of *Utah Power & Light Co. v. Pfof*, 54 Fed. (2d) 803, where the court said: "The purpose of the legislative act in question is not in any manner to infringe on interstate commerce, but is to require the payment of a license tax upon all electricity and electrical energy generated in the state of Idaho for barter, sale, or exchange. It is limited to such electricity and electrical energy as is generated in the state. * * * Our crucial question, therefore is: Does the act when applied to the practical operation of the plaintiff's electrical system infringe upon the commerce clause of the constitution? The principle applicable to this inquiry is, as stated in our original opinion, that, where the production and delivery of the product is essentially local in character and not essentially national and the local interest is paramount, the question as to whether it actually burdens interstate commerce must be determined from the various circumstances in each case. The movement of the commodity for another state must have actually begun and is going on, and the character of the transportation depends upon the circumstances looking to what the owner had done in preparation for the journey and in carrying it out. * * * If then the energy can be measured and determined at its place of production, being the generator, or anywhere on the line before it enters upon its journey in interstate commerce, it is quite clear that the production of the energy in the manner in which plaintiff is doing is essentially local in character and not essentially national, although it is in part thereafter transmitted in interstate commerce. What the plaintiff is doing in the first instance is generating electrical energy from one of the natural resources of the state, the falling water, and the fact that thereafter it transmits and sells it both in and out of the state does not burden interstate commerce

upon the principle recognized by the Supreme Court. * * * The tax provided for by the act is not measured by the amount of electrical energy transmitted nor by the amount sold or used, but solely by production, regardless of where delivered and sold. * * * The process of generating the energy is complete within the state of Idaho. The tax is not one, when applied to kilowatt hours used by Utah consumers, upon the use because the amount of energy produced may be determined at the generator and before it reaches the Utah state line. It is nothing more than a tax upon an article produced within the state which thereafter is in part transmitted in commerce. The fact that the production is in part designed for interstate commerce is immaterial. *Heisler v. Thomas Colliery Company et al.*, 260 U. S. 245, 43 Sup. Ct. 83, 67 L. ed. 237. Nor is the fact that the production is in response to orders for delivery without the state controlling or its production for interstate commerce itself such commerce. *Oliver Iron Mining Co. v. Lord et al.*, 262 U. S. 172, 43 Sup. Ct. 526, 67 L. ed. 929; *United Mine Workers of America et al. v. Coronado Coal Co. et al.*, 259 U. S. 344, 42 Sup. Ct. 570, 66 L. ed. 975, 27 A. L. R. 762; *United Leather Workers v. Herkert & Meisel Trunk Company et al.*, 265 U. S. 457, 44 Sup. Ct. 623, 68 L. ed. 1104, 33 A. L. R. 566. * * * Entertaining these views, we believe there should be a decree for the defendants to the effect that the interlocutory injunction heretofore granted be dissolved and that the tax required by the act with interest and costs of suit be paid by the plaintiff to the state of Idaho, less the penalty provided for in the act during the pendency of the action."

This interesting and far-reaching decision to the effect that the production of electric energy is a proper subject of taxation by the state, although it may later be transmitted and sold in interstate commerce, was reiterated and affirmed in the case of *Utah Power & Light Co. v. Pfof*, — U. S. —, 76 L. ed. 739 (Adv. Sh.), — Sup. Ct. —: "Appellant here, by means of what are called generators, converts the mechanical energy of falling water into electrical energy. Thus, by the application of human skill, a distinct product is brought into being and transmitted to the places of use. The result is not merely transmission; nor is it transmission of the mechanical energy of falling water to the places of consumption; but it is, first, conversion of that form of energy into something else, and, second, the transmission of that something else to the consumers. While conversion and transmission are substantially instantaneous, they are, we are

convinced, essentially separable and distinct operations. * * *

The process by which the mechanical energy of falling water is converted into electrical energy, despite its hidden character, is no less real than the conversion of wheat into flour at the mill.

* * * We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing, and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the constitution does not prevent the state from exercising exclusive control over the manufacture. * * *

So far as it produces electrical energy in Idaho, its business is purely intrastate, subject to state taxation and control. In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce, and state legislation in respect thereof is subject to the paramount authority of the commerce clause of the federal Constitution. * * *

The court below followed the decision of the state Supreme Court (*Williams v. Baldrige*, 48 Idaho, 618, 284 Pac. 203), in holding that section 5 granted an exemption ultimately for the benefit of the consumers of electrical power for irrigation purposes on lands within the state. It seems to us plain that the purpose of the act was to relieve the producer from liability for the tax pro tanto, and to pass on to the irrigation consumers the benefit thereof to the extent—and only to the extent—of the savings effected through the exemption. There is nothing to suggest that the legislature intended to cast any additional burden upon the producer or require him to yield to the irrigation consumers anything beyond the equivalent of the exemption. The irrigation of even private lands in the arid region is a matter of public concern (*Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. 676, 4 Ann. Cas. 1171), and we are of opinion that an exemption of the character here involved is not precluded by the equal protection clause of the Fourteenth Amendment. Compare *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, 40, 72 L. ed. 770, 775, 48 Sup. Ct. 423. * * *

We can not agree with the claim that the violation here is substantial and plain. The statute levies a license tax and creates an exemption therefrom in specified cases. This exemption, although it inures to the benefit of third persons, and whether it be constitutional or not, is obviously a matter properly connected with the subject matter of the act. It is nothing more than a limitation upon the generality of the tax."

§ 424. **Contract of municipality to exempt private property from taxation.**—As the municipality can not exempt this class of property from taxation, because it is private and invested for profit, either gratuitously or for an adequate consideration, the courts will set aside as ultra vires any such attempt on the part of the municipality. The courts, however, are not agreed as to the effect and validity of an agreement made by the municipality with the public service corporation to pay as a consideration for the municipal public utility service rendered it the amount of municipal taxes or to reimburse or forego the collections of such municipal taxes to the extent of the value of the municipal public utility service furnished. The decisions refusing to uphold such an agreement are based on a strict technical construction of the contract, which often does in words provide for exempting such property from taxation, or of an agreement waiving the collection of such taxes in the amount and to the extent that the municipal public utility service is furnished.

A municipality may not exempt from taxation property of a privately owned public utility by a franchise contract to that effect, expressly providing for the payment of a fixed sum in lieu of all taxes and special assessments. In holding such action and the making of such a contract ultra vires, the court of Kentucky in the case of *South Covington & Cincinnati St. R. Co. v. Henkel*, 228 Ky. 271, 14 S. W. (2d) 1068, said that: "The first question arising in the case is, as to the validity of the ordinance of 1892. While this was nominally an ordinance, it was enacted by the city to take effect upon its acceptance by the railway company, and was accepted by the railway company by formal resolution, and so it was simply a contract between the city and the railway company, by which the railway company agreed to pay so much money annually in lieu of all other taxes and charges, including street assessments. Had the city council power to make such a contract? * * * It has no inherent power to exempt from taxation property which it is authorized by its charter, to tax. * * * The contract of 1892 being invalid, the city had the right, at any time, to disregard it, for, being beyond the power of the city council, the contract was void from the beginning."

§ 425. **Contract treated as payment for public service.**—Since the municipality can not actually make such exemptions or waive the collection of such taxes the courts, refusing to uphold such an agreement, are supported by the authorities generally

in a strict literal construction of the principle prohibiting the municipality from doing so. On the other hand, a number of decisions give force and effect to such an agreement and uphold rights of the parties to it where the consideration is a fair and adequate one on the ground that it is practical and in effect only an agreement of the municipality to pay a fair charge for the service rendered it by placing such amount to the credit of the taxes assessed against the corporation providing it with such service; so that while the express agreement may provide for certain exemption from taxation in effect it only amounts to the municipality retaining the money due for the service instead of paying it to the public service corporation and then collecting it back as taxes.

The practical aspect of this principle is well stated as follows in the case of *Bartholomew v. Austin*, 85 Fed. 359, decided in 1898, where the court said: "We do not construe the contract as granting an exemption from taxation. 'Exemption' means free from liability, from duty, from service. It is a grace, a favor, an immunity; taken out from under the general rule, not to be like others who are not exempt, to receive, and not make a return. This being the meaning of the term, the transaction presented in section 11 is not an exemption from taxation. The city needed the water for the several purposes named. To supply it required time, expense, and labor. These things were of value. The taxes to be levied were to be legal obligations for money. The obligations were of value. On a comparing of values, the parties being competent to contract, it was concluded that the values were equal, and the one should be offset by the other. There is no claim that the one value was not as great as the other. No imposition on the one hand, nor favoritism on the other, can be inferred. * * * Even if section 11 should be construed as granting an exemption from taxation, and therefore void, the contract is not necessarily and thereby void, and for water actually furnished by the City Water Company, under section 11, a recovery may be had on a quantum valebant."

§ 426. **Consideration of such contract must be reasonable.**—The same principle is differently expressed and illustrated by another practical decision by the court in the case of *Maine Water Co. v. Waterville*, 93 Maine 586, 45 Atl. 830, 49 L. R. A. 294, decided in 1900, where the court in upholding such an agreement said: "But what we hold is that a municipality may, for a reasonably adequate consideration, in the way of service rendered to it for municipal purposes, agree to make compensation

therefor, for a term of years not unreasonably long, either in whole or in part, by reimbursing the company, in whole or in part, the amount that the company performing the service may be obliged to pay as taxes assessed upon its property. We think that this conclusion is sustained both by reason and the weight of authority. * * * We are therefore forced to the conclusion, from the value of the water service that has been actually furnished—than which no better evidence could be produced—that the contract when made was fair and reasonable; that the city thereby received an amply adequate consideration for its agreement, and has since received a fair equivalent for its payments; and that the contract was not intended as the cover of an illegal attempt to exempt the company's property from taxation."

§ 427. **Contract not in effect an exemption.**—That such an agreement does not in effect amount to an exemption of the property from taxation follows necessarily from the fact that the value of the service rendered is equal to the amount of the taxes credited to the account of the corporation furnishing the service for, as the court said in the case of *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558, decided in 1899: "The contract does not purport to provide that the property of plaintiff shall not be assessed. Its terms indicate that it was intended by both parties that it would be assessed, and that the plaintiff would pay the taxes on the property up to a certain amount, and the defendant all in excess, as a part of the consideration for the supply of water. The city no more exempts the property of the plaintiff from taxation by such an agreement than does the mortgagor who agrees to pay the taxes levied against the mortgaged property exempt the mortgaged property from taxation. Possibly neither possesses the power to exempt property from taxation. Certainly, neither has done it. * * * We do hold that an agreement to pay a portion of the taxes which may be assessed against plaintiff, made upon good consideration, is not an exemption from taxation in any proper legal sense."

§ 428. **Strict construction denies validity of agreement.**—The case of *Dayton v. Bellevue Water & Fuel Gaslight Co.*, 119 Ky. 714, 68 S. W. 142, 24 Ky. L. 194, 7 Ann. Cas. 1012, decided in 1902, refused to uphold an agreement exempting the property of the defendant company from municipal taxes for a fixed period by a strict literal construction of the principle, universally established, that the municipality has no such power unless clearly and expressly conferred upon it in accordance with constitutional

provisions to that effect. In the course of this decision the court said: "The city also agreed that the property used in the construction of the works should be exempt from all city taxes, and that the contract should be in force for a period of twenty-five years from the date thereof. * * * It is clear from this case that the general assembly could not have authorized the city of Dayton to have exempted the property of appellee from taxation. But there is nothing in the act empowering the board of council of Dayton to contract for water for fire and domestic purposes which authorized them, either expressly or by implication, to exempt appellee's property from taxation. But it is urged that this provision of the contract is not really an exemption from taxation, but a part of the consideration which entered into the contract between the parties, and is, for this reason, not in conflict with either the letter or spirit of the constitution. This proposition we think unsound."

A decision to the same effect was rendered by the Supreme Court of Florida in the case of *Tampa v. Kaunitz*, 39 Fla. 683, 23 So. 416, in 1898, the court saying: "We have not been cited to any statute of this state authorizing the city to exempt this species of property from taxation, nor to make a contract so to do. Without valid legislative authority, no city or town has power to bind itself, by contract, either to forbear to impose taxes on particular property, or to impose them only under given limitations, or on certain given conditions."¹⁵

§ 429. Practical statement of rule.—The Supreme Court of Wisconsin, moreover, in the case of *Monroe Waterworks Co. v. Monroe*, 110 Wis. 11, 85 N. W. 685, decided in 1901, furnishes a comprehensive statement of this principle from the practical viewpoint, as follows: "Where, however, the agreement is express, and the intention evident, to exempt property and release it from tax burdens, it is void, and will not be enforced. * * * The rule is equally well established that it is competent for a city and a company to agree that, as the price of services to be rendered, the city will pay a sum equal to the amount of municipal taxes to be levied. Of course, it must appear that the sum so stipulated to be paid is a fair and just allowance to compensate for the actual value of the services to be rendered, and that the stipulation is bona fide, and not in the nature of an evasion of the law against exemption from taxes."

¹⁵ Black, *Tax Titles*, § 63; Cooley, *Taxation*, 200; Blackwell, *Tax Titles*, §§ 110, 117.

CHAPTER 18

SALE OF PROPERTY PROVIDING MUNICIPAL PUBLIC UTILITIES

Section	Section
435. Municipal control by limitation on alienation.	446. Abandoned property may be alienated by municipality.
436. Attitude of courts on municipal control and ownership.	447. Pipe lines on failure of gas may be alienated in public interest.
437. Trust property devoted to public use can not be sold without statutory authority.	448. Transfer to municipality favored in interest of public.
438. Duty to render service personal.	449. Municipal option to purchase provided in franchise.
439. Alienation of property permitted in public interest.	450. Legislative authority must be express to permit transfer.
440. Municipal waterworks public property like parks.	451. Franchise personal to grantee and not transferable.
441. Municipality trustee for public of its water and light plants.	452. Combination agreements defeating competition invalid.
442. Transfer of property by lease must be authorized by statute.	453. Contracts fixing rates or combining competitors invalid.
443. Duty to serve public can not be evaded by alienation.	454. Stock control of competing concerns invalid.
444. Municipal ownership conserved for public interest.	455. Forced sales of public utility property.
445. Public interest and private gain antagonistic.	456. Right of alienation expressly given by statute valid.

§ 435. **Municipal control by limitation on alienation.**—The ease with which municipal corporations may themselves provide municipal public utilities or control them in the hands of private capital depends, in an inverse ratio, upon the power which corporations providing such utilities have to alienate their property. For experience has shown that in almost all cases private corporations stand ready to take over the operation of municipal public utilities where municipal corporations become embarrassed or are found to have made a failure of their operation. Indeed, it has sometimes been charged that influences have been brought to bear to secure an inefficient operation by municipal corporations of such public utilities with the purpose in view of cultivating among the people a feeling hostile to municipal and favorable to private operation. And obviously the power of municipal and state regulation and control over the privately owned

municipal public utility is greatly enhanced by limitations placed on the power of such corporations to sell and convey their property which is useful and necessary in providing their public utility service.

§ 436. Attitude of courts on municipal control and ownership.—The position of our courts in regard to the power of municipal corporations to dispose of their municipal public utility plants has therefore an important bearing on the question of the attitude of the courts toward an increase in the sphere of municipal activity as determined by the matter of the ownership or control of municipal public utilities. This control is now generally supplemented, if indeed it is not supplanted, by state public utility commissions, which have taken the place of the control heretofore attempted to be secured by competition or by the municipalities themselves.

§ 437. Trust property devoted to public use can not be sold without statutory authority.—The supplying of municipalities and their citizens with such public utilities as gas, water, electric light, transportation and communication for public and private use by the municipal corporation or by private capital is the performance of a public duty, and the property so used is charged with a public trust and is devoted to a public purpose. Such property is dedicated irrevocably to the performance of this trust due the public and for its benefit and that of the inhabitants of the municipality. It is a fundamental principle that the trustee can not disable itself from performing the trust by disposing of the property or means necessary to carry out the purposes of the trust relation without express authority from the party creating the trust or directing its administration. The power does not inhere in the trustee to defeat the carrying out of the trust by disposing of the trust property. The interests of the beneficiaries under the trust are guarded against any loss on this account and conserved by the courts holding that such property can not be disposed of by the municipality or other corporation owning it unless under authority conferred specially by statute. The state alone, which attends to the matter of creating these trusts as well as to the selection of the trustees, has the power to provide for their destruction by sale or for their diversion as to trustees by lease or assignment. Having the sole power to create, the state alone has the ability to provide for a change of trustee or a winding-up of the trust entirely; so that in the absence of express legislative authority the courts refuse

to imply the right in the municipal or other corporation, after having accepted the trust, to renounce its duties thereunder or to dispose of the trust property and thus defeat the further carrying out of the trust. Such corporation must continue to perform its duties to the public after having once assumed the trust and undertaken to serve the public needs of the municipality and those of its inhabitants.¹

§ 438. **Duty to render service personal.**—When the power to own and operate such plants for supplying public utilities has been granted to and accepted by any corporation, a franchise is conferred upon it for the purpose of securing some advantage to the public and for the benefit of the inhabitants in their private capacity. Such beneficiaries have the right to complain in case of its relinquishment. This rule is based on the general principle of trusts as well as upon the rule that quasi-public corporations are formed in order to serve the public. The duty imposed is a personal one and the right to perform it, together with the special privileges pertaining thereto, is granted personally as a franchise, on condition that the grantee continue in personal control of such power and in the performance of its duties. The carrying out of the duties of serving the public under such a franchise is regarded as of special importance and the obligation is recognized as being peculiarly personal. Having selected a particular corporation which is responsible and capable of executing the duties of the trust to the public for which are granted special privileges, amounting in most cases practically to monopolies, the law does not permit it to transfer its rights and the accompanying duties to another party which may or may not be responsible and capable of adequately serving the municipality and its inhabitants.

§ 439. **Alienation of property permitted in public interest.**—If at any time it may appear that the interests of the beneficiaries could be best served by some party other than the original grantee, the state which granted the franchise may in its discretion permit such change of grantees, but this must be provided for expressly by the statute. This rule of law is strictly adhered to because it is believed that the interests of the public are thereby best conserved, for observation and experience seem to indicate that the interests of the public are not paramount as to private parties who engage in furnishing these pub-

¹ Dillon Mun. Corp. (5th ed.), §§ 991, 1102, and cases cited.

lic utilities. The desire for dividends actually seems to predominate over that of serving the best interests of the public except in an increasing number of instances where fortunately the two purposes are regarded as consistent and identical. However, in many cases the motive of immediate profit controls, which fact requires very extensive control to be exercised over the private grantees of such franchises or, in lieu thereof, where there is not sufficient control to insure that the public will be served adequately and at fair cost for the service, it becomes necessary that the public serve itself directly or that it have the control which accompanies ownership, while the actual operation is provided for by a leasing of the plant owned by the city. This matter, however, is reserved for later discussion and an examination of the authorities for the foregoing statements will now be attempted.²

² **United States.** *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. 553; *Bullock v. State of Florida*, 254 U. S. 513, 65 L. ed. 380, 41 Sup. Ct. 193, P. U. R. 1921B, 507; *Detroit United Ry. v. Detroit, Michigan*, 255 U. S. 171, 65 L. ed. 570, 41 Sup. Ct. 285.

Federal. *Austin v. Bartholomew*, 107 Fed. 349, writ of cert. denied in 183 U. S. 698, 46 L. ed. 395, 22 Sup. Ct. 934; *New Albany Water Works v. Louisville, Banking Co.*, 122 Fed. 776; *Cumberland Tel. & T. Co. v. Evansville, Indiana*, 127 Fed. 187, affd. in 143 Fed. 238; *Indianapolis, Indiana v. Consumers Gas Trust Co.*, 144 Fed. 640, writ of cert. denied in 203 U. S. 592, 51 L. ed. 331, 27 Sup. Ct. 779; *California-Oregon Power Co. v. Medford, California*, 226 Fed. 957; *Waterbury Gaslight Co. v. Walsh*, 228 Fed. 54; *Gilchrist v. Waycross St. & C. R. Co.*, 246 Fed. 952; *Dearborn Elec. Light & C. Co. v. Jones*, 299 Fed. 432, affd. in 7 Fed. (2d) 806; *Puget Sound Power & C. Co. v. Seattle*, 29 Fed. (2d) 254; *Kentucky-Tennessee Light & C. Co. v. Paris, Tennessee*, 48 Fed. (2d) 795.

Alabama. *Ex parte Birmingham*, 199 Ala. 9, 74 So. 51; *South Central Tel. Co. v. Corr*, 220 Ala. 127, 124 So. 294; *Andalusia v. Alabama Utilities Co.*, 222 Ala. 689, 133 So. 899;

Alabama Water Co. v. Anniston (Ala.), 135 So. 585.

Arkansas. *Augusta v. Smith*, 117 Ark. 93, 174 S. W. 543; *Rogers v. Sangster*, 180 Ark. 907, 23 S. W. (2d) 613.

California. *South Pasadena v. Pasadena Land & C. Co.*, 152 Cal. 579, 93 Pac. 490; *Hanlon v. Eshleman*, 169 Cal. 200, 146 Pac. 656, P. U. R. 1915B, 842; *Henderson v. Oroville-Wyandotte Irr. Dist. (Cal.)*, 2 Pac. (2d) 803; *Coulter v. Sausalito Bay Water Co. (Cal.)*, 10 Pac. (2d) 780; *Moblely v. Board of Public Works*, 44 Cal. App. 167, 186 Pac. 412; *Pacific Gas & C. Co. v. Universal Elec. & C. Co.*, 94 Cal. App. 343, 271 Pac. 377, P. U. R. 1929A, 315.

Colorado. *Inland Utilities Co. v. Schell*, 87 Colo. 73, 285 Pac. 771; *Missemer v. Hugo*, 88 Colo. 222, 1 Pac. (2d) 94.

Georgia. *Byrd v. Alma*, 166 Ga. 510, 143 S. W. 767; *Georgia Power Co. v. Decatur*, 170 Ga. 699, 154 S. E. 268; *Georgia Power Co. v. Rome*, 172 Ga. 14, 157 S. E. 283.

Illinois. *People v. Union Gas & C. Co.*, 254 Ill. 395, 98 N. E. 768, Ann. Cas. 1916B, 201; *State Public Utilities Comm. v. Romberg*, 275 Ill. 432, 114 N. E. 191; *People v. Commercial Tel. & T. Co.*, 277 Ill. 265, 115 N. E. 379, L. R. A. 1917D, 704, P. U. R. 1917D, 272.

Indiana. Lake County Water &c. Co. v. Walsh, 160 Ind. 32, 65 N. E. 530, 98 Am. St. 264; De Motte v. Valparaiso, 161 Ind. 319, 67 N. E. 985, 66 L. R. A. 117; Central Union Tel. Co. v. Indianapolis Tel. Co., 189 Ind. 210, 126 N. E. 628; Public Service Comm. v. Indianapolis, 193 Ind. 37, 137 N. E. 705, P. U. R. 1923D, 415.

Kansas. Keene Syndicate v. Wichita Gas, Elec. Light &c. Co., 69 Kans. 284, 76 Pac. 834, 67 L. R. A. 61, 105 Am. St. 164, 2 Ann. Cas. 949; Janicke v. Washington Mutual Tel. Co., 96 Kans. 309, 150 Pac. 633; Ottawa v. Public Service Comm., 130 Kans. 867, 288 Pac. 556, P. U. R. 1913B, 401; Holton v. Kansas Power &c. Co. (Kans.), 9 Pac. (2d) 675.

Kentucky. Russell v. Bell, 224 Ky. 298, 6 S. W. (2d) 236; Board of Councilmen v. White, 224 Ky. 570, 6 S. W. (2d) 699; Poggel v. Louisville R. Co., 225 Ky. 784, 10 S. W. (2d) 305; Schoening v. Paducah Water Co., 230 Ky. 453, 19 S. W. (2d) 1073.

Louisiana. Farmerville v. Commercial Credit Co. (La.), 136 So. 82.

Maine. Guilford &c. Water Dist. v. Sangerville Water Supply Co., 130 Maine 217, 154 Atl. 567.

Massachusetts. Attorney General v. Haverhill Gas Light Co., 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266.

Michigan. Traverse City v. Citizens Tel. Co., 195 Mich. 273, 161 N. W. 983, P. U. R. 1917E, 962.

Missouri. Cooper County Bank v. Bank of Busceton, 221 Mo. App. 814, 288 S. W. 95.

New Jersey. McCarter v. Vineland Light &c. Co., 72 N. J. Eq. 767, 70 Atl. 177.

New Mexico. Palmer v. Albuquerque, 19 N. Mex. 285, 142 Pac. 929, L. R. A. 1915A, 1106, P. U. R. 1915B, 154.

North Carolina. Board of Trustees v. Henderson, 196 N. Car. 687, 146 S. E. 808.

North Dakota. Otter Tail Power Co. v. Clark, 59 N. Dak. 320, 229 N. W. 915.

Ohio. Stone v. Osborn, 24 Ohio App. 251, 157 N. E. 410, P. U. R. 1928A, 25.

Oklahoma. Durant v. Consumers Light &c. Co., 71 Okla. 282, 177 Pac. 361.

Oregon. State v. Portland General Elec. Co., 52 Ore. 502, 95 Pac. 722.

Pennsylvania. Bailey v. Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837, 63 Am. St. 812; Greensburg v. Westmorland Water Co., 240 Pa. 481, 87 Atl. 995; Brookville v. Public Service Comm., 102 Pa. Super. Ct. 503, 157 Atl. 513, affd. in (Pa.), 160 Atl. 856.

South Carolina. McKiever v. Sumter, 137 S. Car. 266, 135 S. E. 60; Green v. Rock Hill, 149 S. Car. 234, 147 S. E. 346.

South Dakota. Huron Water Works Co. v. Huron, 7 S. Dak. 9, 62 N. W. 975, 30 L. R. A. 848, 58 Am. St. 817.

Tennessee. Bank of Commerce &c. Co. v. Memphis, 155 Tenn. 63, 290 S. W. 990.

Texas. South Texas Public Service Co. v. John (Tex. Civ. App.), 7 S. W. (2d) 942.

Utah. Ogden City v. Bear Lake &c. Water Works Co., 16 Utah 440, 52 Pac. 697, 41 L. R. A. 305; Ogden City v. Water Works & Irr. Co., 28 Utah 25, 76 Pac. 1069.

Vermont. In re New England Power Corp. (Vt.), 156 Atl. 390, P. U. R. 1932A, 11.

Washington. Theis v. Spokane Falls Gaslight Co., 49 Wash. 477, 95 Pac. 1074; State v. Sunset Tel. & T. Co., 86 Wash. 309, 150 Pac. 427, L. R. A. 1917F, 1178, P. U. R. 1915F, 947; Bremerton v. Bremerton Water &c. Co., 88 Wash. 362, 153 Pac. 372, P. U. R. 1916B, 120; Wall v. Smart, 150 Wash. 333, 272 Pac. 711.

Wisconsin. Green Bay &c. Canal Co. v. Kaukauna Gas, Elec. Light &c. Co., 157 Wis. 412, 147 N. W. 701; Wisconsin Gas &c. Co. v. Ft. Atkinson, 193 Wis. 232, 213 N. W. 873, P. U. R. 1927D, 14.

Where a sale of public utility property effects a saving in financing the plant and in the purchase of supplies, which should be reflected in reduced rates and improved service for the benefit of the consumers, the court permitted such a sale on a finding by the lower court that it would be advantageous, thereby sustaining the right of the owners of the property to dispose of it under such conditions and with such effect, for as the court said in the case of *Ottawa v. Public Service Comm.*, 130 Kans. 867, 288 Pac. 556, P. U. R. 1931B, 401: "Had they waited for the city of Ottawa to build transmission lines and distribution systems for them, perhaps they never would have had electricity. They obtained that in the first place by building their own distribution systems and their own transmission lines. The city of Ottawa did not obligate itself in any way for the construction and maintenance of those systems and lines. After these were built, the small cities found it difficult to maintain them, for the reason that they were unable to employ, at sums they were able to pay, competent superintendents, linemen, etc., to keep their systems and lines in repair. The result was, these deteriorated and the service was poor and unsatisfactory. When the Municipal Power Transmission Company took these lines over, it was necessary to rebuild them. They were put in good condition and furnished satisfactory service, but in doing this the transmission company had exhausted its credit, or at least to the extent that it became difficult for it to finance itself. The trial court found, among other things, that there was reason to believe that the sale of the property to the Kansas City Power & Light Company would effect a saving in financing expenses, and would be advantageous in the purchase of supplies and equipment, which benefits should be reflected in reduced rates, to the consumers. Hence, so far as the communities to be served were concerned, it is reasonable to anticipate an advantage to them resulting from the purchase of the property by the Kansas City Power & Light Company.

* * * Naturally, if the service were poor and the purchaser contemplated improving the service, that fact would constitute a reason for permitting the sale; but, if the service is good, and the purchasing company will continue good service, possibly at a lower rate, we see no reason why the public service commission should object to the transfer of title. The individuals owning the property should have something to say as to whether they can sell it or not. To deny them that right would be to deny to them an incident important to the ownership of property."

§ 440. **Municipal waterworks public property like parks.**—The case of *Huron Waterworks Co. v. Huron*, 7 S. Dak. 9, 62 N. W. 975, 30 L. R. A. 848, 58 Am. St. 817, decided in 1895, was an action to have an attempted sale of the waterworks plant of the respondent city to the appellant, a private corporation, declared void. Before such attempted sale the plant had been owned and operated by the city for supplying its public wants and for domestic purposes. The question decided in the negative by this case is as to whether the council of the city of Huron possessed the power, unaided by the state legislature, to sell and transfer the Huron waterworks system to the appellant. In addition to the power given the city expressly by statute to construct and maintain waterworks, the only statutory authority granted provides, "that the city of Huron * * * shall have power to make all contracts necessary to the exercise of its corporate powers, to purchase, hold, lease, transfer, and convey real and personal property for the use of the city * * * and to exercise all the rights and privileges pertaining to a municipal corporation." In the course of its convincing opinion setting aside the attempted sale as unauthorized, the court, after citing and discussing at length a number of leading authorities, expressed itself as follows: "Having, as we think, established the proposition that the waterworks of a city, when constructed and owned by the city, are to be regarded the same as other city property held for public use, and therefore charged and clothed with a public trust, it would seem to follow that such property can not be sold and conveyed by the mayor and common council of the city unless under special authority conferred upon them to so sell and convey the same by the legislative power of the state. * * * From this examination of the authorities we conclude that there is no distinction between the nature of waterworks property owned and held by the city, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, courthouses, fire engines, and apparatus, and other property owned and held by the city for public use. All such property is held by the municipality as a trustee in trust for the use and benefit of the citizens of the municipality, and it can not be sold or disposed of by the common council of the city, except under the authority of the state legislature. * * * But such property is so owned and held by the municipality as the trustee of the citizens of the municipality, for the use and benefit of such citizens. It has been acquired by the corporation at the expense of the taxpayers of the city, for their use and benefit, and the law will not per-

mit the corporation to divest itself of the trust, nor to deprive the citizens of their just rights as beneficiaries in the same."

§ 441. **Municipality trustee for public of its water and light plants.**—The case of *Lake County Water & Light Co. v. Walsh*, 160 Ind. 32, 65 N. E. 530, 98 Am. St. 264, decided in 1902, was an action to have set aside as fraudulent a deed of conveyance of the water and light plant of the city of East Chicago by said city to the appellant, a private corporation. In granting the relief asked for the court said in part: "It seems clear, upon the soundest reasoning and from the great weight of authority, that property held and used by a city for public purposes is held in trust for the inhabitants, and can not be sold or disposed of unless the city is specially authorized by the legislature to make such sale or disposition and thereby determine the trust. * * * The remaining question is whether waterworks and an electric light plant constructed or purchased by the city and maintained by it for the extinguishment of fires, for domestic purposes, for lighting the streets, and for use in the houses of the inhabitants of the city are to be regarded as property devoted to a public use. * * * The right to furnish water for protection against fire, to clean the streets, to flush sewers, and for the supply of the inhabitants, and the right to light the streets and public places, and to furnish gas or electricity to the inhabitants, are among the implied and inherent powers of a municipal corporation for the protection of the lives, health, and property of the inhabitants of the city, and, as to the lighting, as a check on immorality. Unquestionably these are public purposes. * * * In our opinion waterworks and electric light plants held, owned, and maintained by cities * * * must be regarded as property held in trust for a public use. Nor do we think they lose that character by reason of the fact that water and light are supplied to the inhabitants for domestic purposes, and that rentals and charges are paid for the same."

§ 442. **Transfer of property by lease must be authorized by statute.**—In the case of *New Albany Waterworks v. Louisville Banking Co.*, 122 Fed. 776, decided in 1903, the court refused the right to the plaintiff, a private corporation, in the absence of express statutory authority, to lease to another like corporation the property, franchise and contracts of its waterworks system, with which it was supplying water to a municipality and its inhabitants. The case is mentioned in this connection for the reason that the court indicated that it is beyond the power of a municipality to validate such a lease by its consenting thereto. The

court said: "The final contention in aid of the lease rests on the alleged assent thereto on the part of the city of New Albany. * * * The corporation is created by the state, and not by the municipality. While the latter may grant privileges to the corporation which are within their respective powers derived from the state, it can confer no authority upon the corporation to transcend those powers. The ordinance, therefore, is without force as authority for the lease."

That a rule similar to the one governing leases obtains in cases of sale of property by and between public utilities is indicated in the case of *Public Service Comm. v. Indianapolis*, 193 Ind. 37, 137 N. E. 705, P. U. R. 1923D, 415, where the court held that: "Interpreted in the light of the facts we have stated, the provisions last quoted clearly authorize any and all corporations organized and operating as public utilities to buy from and sell to each other, on terms fixed by the commission, whether they do or do not own and operate intersecting or parallel lines, or conduct their business in the same locality. *Burns'* 1914, section 10052r3. The section quoted does not forbid the purchase and sale which the complaint in this case alleges certain of the appellees to be intending, but expressly authorizes it if duly approved by the commission and consented to by the stockholders. * * * The proposed sale by certain companies to another company of property owned by them does not constitute a merger or consolidation, and no question is presented for decision as to the right or power of these companies to merge or consolidate. The consolidation of corporations is wholly different in law from a sale of property by one to another. *Norton v. Union T. Co.*, 183 Ind. 666, 680, 110 N. E. 113, Ann. Cas. 1918A, 156."

§ 443. **Duty to serve public can not be evaded by alienation.**—The federal court in the case of *Cumberland Tel. & T. Co. v. Evansville, Indiana*, 127 Fed. 187,³ refused the right of such a corporation to sell its property to another in the following emphatic language: "The statute under which the Evansville Telephone Exchange was incorporated does not expressly authorize corporations organized under it to sell all their property. Nor is there any implied power granted to do this. The first section authorizes 'any number of persons to form themselves into a corporation for the purpose of establishing, maintaining and operating'—not for selling and disposing of—'telephones, telephone lines and telephone exchanges'; and the articles of association of

³ Affirmed in 143 Fed. 238.

the Evansville Telephone Exchange were prepared pursuant to this authority. There is neither express power given by the statute, nor can there be worked out of it any implied power to do that which will make it impossible for the corporation to do the thing for which it was organized. A quasi-public corporation can not disable itself for the performance of its functions by the sale and transfer of all its property without legislative authority.

* * * The Evansville Telephone Exchange was authorized and empowered to establish and maintain its telephone system, not to sell it; to accomplish the object of its incorporation, not to defeat it; to acquire the means to enable it to perform its duties to the public as a corporation, not to disable itself from performing those duties. The attempted sale of all of its property and franchises was ultra vires, and contrary to public policy, and therefore null and void."

A public utility may not sell its property and incapacitate itself from performing its public duties without the consent of the state or municipality, and a contract attempting to do so without such consent will not be enforced because of the public welfare involved in the transaction, as is indicated in the case of *Guilford & Sangerville Water Dist. v. Sangerville Water Supply Co.*, 130 Maine 217, 154 Atl. 567: "Defendant corporation is engaging in a quasi-public occupation. Such corporations hold their franchises not only for their stockholders, but also in trust for the public. *Stockton, Attorney General v. Central Railroad*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97. A quasi-public corporation may not, without legislative consent, so deal with its property as to incapacitate itself from performing its public duties. * * * The evidence warrants finding that the water company took over the contract, but the proposal to sell the water system went beyond the scope of corporate power. A court of equity will not compel performance of an ultra vires agreement."

While a public utility may not sell its property without the consent of the state, upon such terms and conditions as the state may impose in granting such consent, an order of the railroad commission providing for the continued service at the prevailing rates is valid and binding on the purchaser and will be enforced in the interest of such public utility patrons. In holding that such an order of the railroad commission is final and beyond the court to modify or set aside, especially after its acceptance by the purchaser, the court expressed this principle as follows in the case of *Henderson v. Oroville-Wyandotte Irr. Dist.* (Cal.), 2 Pac.

(2d) 803: "The defendant district having accepted transfers of the two utility systems under the express agreement that it would enter into contracts in conformity with the terms of said resolutions, can not by its refusal to comply with its agreement after it has acquired said property, escape the obligations assumed by it in the resolutions under which it agreed to purchase said property. It is bound by this contract as effectively as if it had in accordance with its agreement entered into formal contracts with the outside water users. * * * The defendant district accepted conveyances from the two public utility companies upon the conditions imposed by the railroad commission, and expressly agreed that it would enter into written contracts with the outside water users whereby it would obligate itself to perform said conditions. Its subsequent refusal to enter into such contracts with the outside water users did not entitle it to hold the property conveyed to it free from the conditions imposed by the railroad commission, and which it had consented to by its said resolutions. * * * The terms set forth therein were made conditions upon which the railroad commission granted it authority to make such conveyances, and, as the district accepted such conveyances subject to such conditions, it can not now refuse to carry out its contract upon the ground that the contracts were beyond the power of the utility companies to make, or that the district itself exceeded its powers in agreeing to carry out these contracts after its acquisition of the properties from the utilities. * * * Section 51(a) of the Public Utilities Act requires the consent of the railroad commission to the sale and transfer of any public utility. No sale of property burdened with a public use is legal, or of any validity whatever, except the authority to make such sale is first given by the railroad commission. In approving or authorizing such a sale, the railroad commission has jurisdiction to impose such conditions as will in the judgment of the railroad commission protect and safeguard the preexisting rights of those entitled to service under said public utility. * * * The order of the railroad commission has become final in that respect, and determines that question beyond the power of this court to modify or set aside, at least in a proceeding like that now before us. In view of the fact that the district consented to these rates, in fact, as far as the record before us shows, took the initiative in having them incorporated in the order of the railroad commission, it is now in no position to complain that they are unreasonable or that it should not be governed by them in its dealings with the out-

side water users. We therefore conclude upon this branch of the case that the railroad commission in safeguarding the rights of the outside users in the manner and to the extent it did by its order authorizing the sale, merely sought to preserve to the outside users their preexisting rights under the two public utilities."

§ 444. **Municipal ownership conserved for public interest.**—The case of *Ogden City v. Bear Lake &c. Waterworks Co.*, 16 Utah 440, 52 Pac. 697, 41 L. R. A. 305, decided in 1898, was an action to set aside a lease of the waterworks plant while owned and operated by the plaintiff city, made by such city to the defendant, a private corporation. In finding such lease to have been made without authority and to be therefore void, the court used the following language: "Ogden City was a public corporation, and its authority was limited to such powers as were expressly granted by statute, and such as might be necessary to those expressly given. Undoubtedly, water distributed to a city and its inhabitants is devoted to a public use, and the entire system, whether consisting of reservoirs, conduits, pipes, or other means used to accomplish the delivery is also dedicated to the same use. The control and management of property dedicated to the use of the people of a city is given for their benefit, not for the individual benefit of the public authorities. * * * They can not deprive the public of the benefit of property rights or powers affected with a public use by conveying or leasing it to others, unless their charter specially authorizes it, though such other corporation or person may undertake to give the public the use of it for compensation deemed reasonable. * * * When property whose use is devoted to the public is conveyed or leased to private corporations, though a contract may require its use to be given to the public for a reasonable remuneration, the public, to a great extent, loses its control over it, and any net income realized goes into the hands and pockets of private parties. In fact, such parties can not give the use of their property to the public for the actual cost of it, and the actual expense of the business, as in this case. They must have profits, and it is to the interest of such parties to make the profits or net income as large as public officials will consent to make it. The people usually get fleeced when the city places its waterworks in the hands of private parties. Public-spirited men are not at all times free from the undue influence of self-interest. Their disposition to favor the public is not equal to their inclinations to favor themselves."

§ 445. **Public interest and private gain antagonistic.**—This case has been quoted from at length not only for its clear enunciation of the principle of law at issue but especially for its discussion of the reasons for the decision and for the practical attitude which the court takes in dealing with the situation. That private gain is the controlling motive where such public utility services are rendered by private capital is natural and inevitable and this court seems of the opinion that municipal ownership and operation are necessary to secure proper service at reasonable and uniform rates to the public and the individual inhabitant. The case also takes the position, although not necessary to the decision, that since the public use of the property and the duty to the public are the grounds for the principle of law laid down, where the property of the city is not necessary or no longer suitable for such use, it may be disposed of by the city. And it is submitted that this is a practical limitation on the general doctrine denying to the city the right by implication to sell or lease its property acquired and used for public purposes.

§ 446. **Abandoned property may be alienated by municipality.**—In the case of *Ogden City v. Waterworks & Irr. Co.*, 28 Utah 25, 76 Pac. 1069, decided in 1904, the same court passed directly upon the question of the exception to the general principle under discussion in holding to be valid a lease made by the plaintiff city to the defendant of its waterworks plant which was about to be abandoned by said city and was no longer capable of meeting the public and private demands made on such a plant. The decision gave the authority of law to the dictum found in the earlier case referred to as decided by this court, and is to be commended for its highly practical treatment of the situation. After finding the system to have been insufficient the court added that, "there is evidence in the record that tends to show that the system itself had about outlived its usefulness. * * * In view of the conditions that existed and confronted Ogden City at the time the lease was made, we are of the opinion that the city council not only acted within its authorized powers in authorizing its execution and afterwards ratifying it, but that, under the circumstances, those powers were wisely exercised, for it is apparent that, after the city had decided to abandon its old waterworks system, it was necessary to make some disposition of its water right; otherwise, in course of time, it would be lost by nonuser."

That uncompleted municipal property, not yet dedicated to public use, may be alienated is the effect of the decision in the

case of *Palmer v. Albuquerque*, 19 N. Mex. 285, 142 Pac. 929, L. R. A. 1915A, 1106, P. U. R. 1915B, 154: "Generally speaking, property devoted to a public use can not be sold or leased without special statutory authority, although property which has ceased to be used, or is not used, by the public may be sold or leased as the public welfare may demand. 3 *McQuillen, Municipal Corporations*, section 1141; *Fort Wayne v. Lake Shore & M. S. R. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, 32 Am. St. 277. It is thus to be seen, as pointed out by the Supreme Court of Indiana, in the case last cited, that while municipal corporations can not dispose of property of a public nature in violation of the trusts upon which it is held, there is a distinction between property purchased for a public use, and not yet dedicated, and property which is purchased for that purpose, and actually dedicated to that use. We use the term 'dedicated' in the sense, defined by Webster, devoted to a use; appropriated; given wholly to. In this sense of the word, municipal property is not impressed with a public trust until it has been given over, appropriated, or devoted to a public use. As pointed out in the brief of appellee, the building in its present condition is of no more use as a city hall than were the vacant lots before the erection of the building was commenced. Neither the lots nor the building have in any way been opened or devoted to any particular use, and can not be until the building is completed and ready for use. We therefore do not consider that this property has been so impressed with a public trust as to defeat the right of alienation."

§ 447. **Pipe lines on failure of gas may be alienated in public interest.**—This situation as to the disposition of property, owned for the purpose of serving the public and having become wholly unfit for the further giving of such service, is even more strikingly found in the case of *Indianapolis, Indiana v. Consumers Gas Trust Co.*, 144 Fed. 640,⁴ decided in February, 1906. The decision of this case held valid a certain option given the appellant city by the respondent for the sale of its gas plant with which it had supplied the inhabitants of the said city with natural gas. This option to purchase had been given the city as a condition of the granting of the franchise to the respondent company when the plant was originally installed and the city had given notice according to its terms of its election to exercise its rights to

⁴ Writ of certiorari denied in 203 U. S. 592, 51 L. ed. 331, 27 Sup. Ct. 779.

purchase the plant under such option. At the time this action arose to enforce such sale the supply of natural gas had failed, so that this gas plant was not furnishing gas nor had it been in position to do so for several years. To have held that such a sale was ultra vires because the company owed the duty of furnishing gas to the public would have been an unwarranted misapplication of a well recognized principle of law and a complete perversion of the purpose intended to be accomplished thereby, namely the protection of the public interests as against those of private parties. In the nature of things it was impossible for the company to continue to supply the public so as to that purpose the plant was mere junk. By purchasing the plant under its option the object of the city was to make possible the installation of an efficient artificial gas plant for the accommodation of the inhabitants of such city at a reasonable rate. The court by Grosscup, J., said: "The thing enjoined by the court below [which is reversed here] was not the construction or operation of a municipal natural gas plant. The thing enjoined was the purchase of dead mains and pipes—a purchase in the promotion of a purpose to construct and establish works that would distribute artificial gas—just such a public work as the statutes admittedly allow."

Where there is no evidence that the property sold was necessary or useful to the public utility in performing its public duties, because the property was not used in the operation of the plant, and there was evidence that the utility's franchise was no longer effective, the court refused to set aside the sale in the case of Dearborn Electric Light & Co. v. Jones, 7 Fed. (2d) 806, and indicated its reason for so holding as follows: "The appellant is an electrical company. In order to render a sale by it of its property void under this section two things would have to be shown: (1) That the property was necessary or useful to the corporation in the performance of its public duties; (2) that no consent order was obtained. But such a sale would not necessarily then be void. It would not be if the purchaser was one for value in good faith. The elements which make a purchaser in good faith for value are: An actual sale, a present consideration and an honest, legally justifiable, belief that the vendor has the right to sell. * * * But here where the issue of the legality of the sale was not tendered to the appellee in the trial before the referee, where no evidence was offered to show the property was necessary or useful to the appellant in performing its public duties (except where evidence

offered for other purposes incidentally tended to show it), where there was no evidence that a consent order was not obtained, and appellee was not called upon either to rebut a prima facie case or produce proof that the sale was within the exception, it seems manifestly unfair to ask appellee to defend such issue on petition for review or on appeal. * * * It is likewise true that a sale of the entire plant would ordinarily be the sale of property necessary or useful within the meaning of the statute. But such would not be true in every case. Suppose the appellant company's franchise had expired or had been annulled. It would no longer have any public duties to perform in the town of Dearborn. Its property there would no longer be necessary or useful in the performance of public duties. There is evidence in the record which indicates that the franchise granted to appellant had been annulled. * * * What the facts are we do not know. But the point is that appellee had no opportunity to present any defense on this issue. Whether the appellant could have shown the sale was within the statute or whether the trustee of the bankrupt company could have shown it was within the exception, this record does not disclose. Certainly the record falls far short of showing the sale was within the statute and without a consent order and void. It is, therefore, our conclusion that in the former opinion we gave too broad a construction to the exception in the statute but that the result arrived at was correct."

§ 448. **Transfer to municipality favored in interest of public.**—While this idle condition of the property was recognized by the court in *Indianapolis, Indiana v. Consumers Gas Trust Co.*, supra, and must have had a material, practical effect upon its decision, the ground expressly given is the expiration of the franchise by the election of the city to purchase the plant according to its option, which the court found to be a valid condition to the granting of such franchise. The court took occasion to draw the distinction between this agreement to sell a public service plant to a municipality and agreements to sell to other parties, saying: "Examination of the numerous authorities cited for and against the contention of *ultra vires* reveals no case involving a provision of like character with this option clause, nor one in reference to a right to transfer the corporate property to a municipality under any circumstances. * * * In none of the citations, state or general, are there any reasons stated that seem inconsistent with the proposition that a corporation, engaged in a service of public utility, may contract for a sale to the munic-

ipality of all of its property therein, either through a condition accepted in the franchise from the city, or through subsequent arrangement. The question whether municipal ownership is favorable to the public interest, is neither involved in, nor open to, judicial inquiry. Assuming that such ownership is authorized, and is contemplated or demanded by the municipality, we are convinced that this proviso, treated alone as a contract of sale on the part of the gas company, is not within the inhibition of the rule—not *ultra vires*. The public policy which is mentioned in the cases cited, as opposed to an implication of charter power to turn over its property to another and 'abnegate the performance of its duties to the public,' has no application to the transfer to the public—the municipality—of property used in public service." The United State Supreme Court refused to reconsider this decision on a writ of certiorari, October 29, 1906, thereby making it effective as rendered.

In a sale to the municipality under the statutory provisions of the public utility law the court held that the city did not take the property subject to existing operating indebtedness in the case of *Green Bay & Mississippi Canal Co. v. Kaukauna Gas, Electric Light &c. Co.*, 157 Wis. 412, 147 N. W. 701: "Does a municipality, in acquiring a public utility subject to the provisions of section 1797m80 et seq., Stats. 1911, render itself liable for unpaid rent on a lease owned by the utility and acquired in the proceedings? When the defendant Kaukauna Company received an indeterminate permit, it thereby agreed that the city of Kaukauna might acquire its property subject to the provisions of the public utility law. That law, however, authorizes the municipality to acquire nothing but the property of the public utility. It does not authorize it to acquire the corporation itself or its obligations, or to incur any indebtedness on account of any liability of the corporation. The statute limits the municipality strictly to the acquisition of the property of the public utility, and such was the scheme consented to by the Kaukauna Company when it received its indeterminate permit. It can not now be heard to say that in acquiring such property the city also assumed an obligation to pay for rental of power used by it long before the city took over its plant. In acquiring such property the municipality must take it subject to any valid liens thereon up to the amount of compensation fixed by the railroad commission; but it does not assume a liability for any indebtedness arising out of the use of power furnished the public utility before it

acquires the plant. Such indebtedness must be liquidated by the public utility."

§ 449. **Municipal option to purchase provided in franchise.**—This distinction is supported by the common observation, made by this court, which is here recognized and given the effect of law, that the public interests in public utility plants are so much more secure when controlled by public than by private capital that an agreement of a public or quasi-public corporation to sell to the one may be allowed, in the absence of express statutory authority, while the law refuses to permit such an agreement to stand when made with private parties. This must be the chief consideration for upholding the options to purchase such plants, which are now so commonly taken by the municipality when granting franchises. And such a precaution is a very wise one for the city to take, for it provides the opportunity for the municipality at any time to take over such property and control it absolutely for the public benefit. And while experience shows that this action is sometimes necessary the fact that it can be done so summarily acts as an important factor in forcing public consideration into the service rendered by the private concern.

In taking over the property of a public utility under the terms of its franchise the municipality is not liable to pay past salaries although actually unpaid, for as the court said in the case of *Bremerton v. Bremerton Water & Power Co.*, 88 Wash. 362, 153 Pac. 372, P. U. R. 1916B, 120: "It appears that the pipe company, while constructing the plant and before their sale to Garrison & Fisher, had failed to enter upon the books allowances for services of their higher officers, or what might be called reasonable overhead charges in the construction of the plant, and it would seem on hasty consideration as if, even after lapse of time, some allowances in that respect might be made. But, upon full consideration, we must sustain the objection of the city to this item. The trouble to begin with is that it is too vague.

* * * Indeed, it may well be said that these overhead items are something which the then owners not only did not pay, but actually saved. At all events, we are not satisfied that this should be included in a contract calling for purchase at actual cost. The item is accordingly disallowed."

In upholding the power of the city to acquire a public utility system on the expiration of its franchise the court in the case of *Detroit United Ry. v. Detroit*, Michigan, 255 U. S. 171, 65 L. ed. 570, 41 Sup. Ct. 285, said: "This court in *Detroit United R. Co. v. Detroit*, 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. Rep.

697, affirming the judgment of the Supreme Court of Michigan in the same case (172 Mich. 136, 137 N. W. 645), held that where a street railway company, operating in the streets of the city under a franchise granted for a definite period, has enjoyed the full term of the grant, the municipality may, upon failure of renewal of the grant, require the company, within a reasonable time, to remove its tracks and other property from the streets, without impairing any contractual obligations protected by the federal Constitution, or depriving the street railway company of its property without due process of law. We see no occasion to depart from the principles announced in that case. * * * But, if the city has the right to acquire the property on the best terms it can make with the company, in view of the expiration of the franchises, an attempt to carry out such purpose by an offer to buy the property at much less than its value would not have the effect to deprive the company of property without due process of law. It was so ruled in *Denver v. New York Trust Co.*, 229 U. S. 139, 57 L. ed. 1123, 33 Sup. Ct. 657, *supra*. * * * The charter of the city of Detroit gave ample power to the city to acquire, construct, own, maintain, and operate a street railway system on the streets of the city within a distance of ten miles from any portion of its corporate limits that the public convenience may acquire. * * * Under the authority of the charter, the ordinance in question was passed. It directs the board of street railway commissioners to acquire, own, maintain, and operate a street railway system. It requires that the proposition to acquire, own and maintain the system and to issue bonds shall be submitted to a vote at a special election. * * * We find nothing in the allegations of this bill establishing that the city of Detroit, in proceedings by its officials in the manner alleged, has done things which are subversive of the rights of the city to establish its own municipal system of street railways and to issue bonds for that purpose, or which would amount to deprivation of rights secured to the plaintiff by the Fourteenth Amendment to the federal Constitution."

§ 450. **Legislative authority must be express to permit transfer.**—The Supreme Court of California in the case of *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490, decided in 1908, furnishes a terse statement of the principle, which is generally accepted by the courts, that any corporation, whether municipal or private, engaged in the furnishing of municipal public utility service can not sell and transfer to private capital its property devoted to that purpose without legislative

authority, and that any attempted transfer of such property, which is not so authorized, is void and of no effect. This court said: "The respondent in a quasi-public corporation, engaged in supplying water for public use. This is admitted and it is conceded that corporations of that character can not, without legislative sanction, transfer to another the entire property devoted to such service and the business of carrying it on. This appears to be settled by the authorities."

As such a corporation can not sell its property necessary to provide such service because the effect of doing so would be to disable it from rendering the service, it necessarily follows, and is so held by the courts, that it can not transfer or in any manner dispose of its franchise rights to use the streets and other public places to furnish such service without legislative authority. This is decided in the case of *State v. Portland General Electric Co.*, 52 Ore. 502, 95 Pac. 722, decided in 1908, as follows: "The corporation can not absolve itself from the performance of its obligations without the consent of the legislature. * * * It may be considered as settled that a corporation can not lose or alien any franchise or any property necessary to perform its obligations and duties to the state without legislative authority."

In the absence of express statutory authority a sale and transfer of public utility property and franchise rights are not valid for as the court in the case of *People v. Commercial Tel. & T. Co.*, 277 Ill. 265, 115 N. E. 379, L. R. A. 1917D, 704, P. U. R. 1917D, 272, said: "It is now settled by an overwhelming weight of authority that public or quasi-public corporations, such as gas companies, water companies, electric companies, telegraph and telephone companies, railway companies, and all similar corporations which owe duties to the public as well as to their stockholders, have no right to transfer their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. 12 R. C. L. 217; 3 Thompson on Corporations, section 2906; 37 Cyc. 1616; *Cumberland Telephone Co. v. City of Evansville (C. C.)*, 127 Fed. 18, 3 Cook on Corporations, section 941; *Attorney-General v. Haverhill Gaslight Co.*, 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266, and notes; *Brunswick Gaslight Co. v. United Gas Co.*, 85 Maine 532, 27 Atl. 525, 35 Am. St. 385, and notes; *Thomas v. West Jersey Railroad Co.*, 101 U. S. 71, 25 L. ed. 950; *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55. * * * The grant in the ordinance to the Westfall Telephone Company was to it alone, and not to

it and its successors and assigns, and there were no words used in the grant signifying that its successors or assigns could succeed to the rights of the Westfall Telephone Company. The grant was therefore not assignable, as the statutes of our state do not expressly authorize such a transfer."

That the public utility law grants express authority to the public service commission to consent to the sale and transfer of public utility property and withdraws the power of local control and consent is held in *Central Union Tel. Co. v. Indianapolis Tel. Co.*, 189 Ind. 210, 126 N. E. 628, as follows: "There can be little doubt that it was the purpose of the legislature to confer on the public service commission the power to control all mergers, consolidations, and sales of public service corporations in such a way as to do justice to the public, as well as to those engaged in furnishing service to the public. It is equally clear that it was not the purpose of the legislature to divide this power so as to leave any portion of it in the municipality in which the public service corporations were doing business. The complaint does not allege that appellee surrendered its franchise and accepted an indeterminate permit under the provisions of section 101 of the Public Utilities Act; and it must therefore be assumed that the instrument in question has not been abrogated as a whole by a mutual relinquishment of rights and a release of the obligations thereunder by the state, on the one hand and appellee, on the other. * * * There can be no doubt as to the authority of the legislature to confer on the public utilities commission the power to give its consent and approval to the sale, or lease of the properties of public utility corporations in conformity with a general law enacted on the subject and to provide that such sales or lease might be made with such consent or approval, but not otherwise; and there can be no doubt that the commission may legally exercise the power granted except in cases where the exercise of such power would have the effect of impairing the obligations of a valid and subsisting contract or would otherwise interfere with some constitutional right. * * * By the Public Utilities Act the state did withdraw the power of the city to abrogate the contract in its entirety and to substitute another in its place. By section 101 of that act any public utility may within a period of time fixed, on certain conditions provided, surrender its license, permit, or franchise and receive in lieu thereof an indeterminate permit as provided in the act. By that act the state reassumed the power to act on that subject and delegated such power to the public serv-

ice commission. *Winfield v. Public Service Commission*, 187 Ind. 53, 118 N. E. 531, *supra*. As appellee did not surrender its grant within the time prescribed, it still remains in force as a contract. * * * By section 95½ of the Public Utilities Act, the power to give or to withhold consent to such sales was withdrawn by the legislature from all of the municipalities of the state, and that power was delegated to the public service commission. After the taking effect of that act, the sole power to give or to withhold such consent rested in the commission, and municipalities were entirely shorn of such power."

Where a statute authorizes the sale and transfer of municipal property when the approval of the railroad commission of the state is obtained, such approval is essential and a transfer or sale of such property can not be effected without it, as is indicated in the case of *Wisconsin Gas & Electric Co. v. Ft. Atkinson*, 193 Wis. 232, 213 N. W. 873, P. U. R. 1927D, 14, where the court said: "What is there provided is that before a municipality which is an agency of the state may do certain things with respect to property acquired by it in a proprietary capacity, the matter shall be submitted to the railroad commission, an administrative agency of the state, which shall determine whether or not the best interests of the municipality and the residents thereof will be served by the sale, and if the railroad commission is not of the opinion that the best interests of the municipality and of the residents thereof will be served by a sale the parties have no power to proceed further; the matter is at an end. The reason for the requirement is plain. The railroad commission has a large experience in utility business, a corps of experts at its command, and every facility for passing upon the real merits of the proposal. Local prejudices and jealousies do not enter into its determination. * * * Upon a consideration of the whole matter it is held that the finding of the commission is in substantial compliance with the terms of the statute; that the matter inserted in the finding is surplusage inserted for the purpose of indicating that the commission did not pass upon questions of public policy of a semipolitical nature which were more properly to be submitted to the electorate. While the extraneous matter should not have been incorporated, the finding being substantially in accordance with the statute, it is sufficient."

Although the approval of the state railroad commission is required to effect a sale and transfer of any public utility property, which the vendor is obliged to secure in making the sale,

application for this approval need not precede negotiations upon the terms of sale, but this consent may be secured after the purchase-price has been tendered or paid, for as the court said in the case of *Otter Tail Power Co. v. Clark*, 59 N. Dak. 320, 229 N. W. 915: "It is true that under the * * * provision of the Public Utilities Act the defendant was inhibited from selling his utility property to the plaintiff without 'first having secured from the commissioners an order authorizing it to do so,' and that the sale made without such order is void. The statute, however, did not inhibit the parties from entering into preliminary negotiations and agreeing upon the terms of the sale. The sale, of course, could not become effective or be consummated until the board of railroad commissioners, as representatives of the public, authorized it; but the legislature certainly did not intend that parties before entering into negotiations must obtain the permission of the board of railroad commissioners to do so. Obviously, the board of railroad commissioners could not determine whether it would grant permission to make a sale unless it knew what the terms and conditions of the sale were to be. * * *

A person who enters into a contract to sell a utility property, which contract, in order to become effective must have the approval of the board of railroad commissioners, certainly vests in the proposed purchaser a sufficient interest to entitle him to make application to such board for approval of the proposed sale.

* * * A careful consideration of the facts and circumstances in the case leads us to the conclusion that the trial court was justified in granting injunctive relief against the defendant. While it may be said that both parties are in delicto, it can not be said that they stand in *pari delicto*. * * * As has been noted, the primary duty to obtain the authorization of the board of railroad commissioners to make the sale was upon the defendant and not upon the plaintiff. The defendant failed to perform this duty, and warranted to the plaintiff that he had a right to make the sale; and, upon such warranty being made, it paid to him the purchase-price. * * * The undisputed evidence shows that the plaintiff in this case is in possession of the utility property, and has been in possession and operating the same for a considerable period of time. Interference with the possession and operation of such property would in all likelihood result in injury to the parties who are being supplied with electric current. If the board of railroad commissioners had been of the opinion that continued possession and operation by the plaintiff would be injurious to public interest, it can hardly be as-

sumed that such board would not have taken some affirmative action to remedy the condition which was presented to them."

Where a contract and its assignment of public utility property contains no provision against its being assigned, the sale and transfer become effective on the approval by the state commission, which may be secured in connection with its approval of a schedule of rates, for as the court said in the case of *Pacific Gas & Electric Co. v. Universal Electric & Gas Co.*, 94 Cal. App. 343, 271 Pac. 377, P. U. R. 1929A, 315: "Appellant claims that the contract was not assignable, and, further, that neither the original contract nor the lease purporting to assign the same having been filed with the commission, as parts of plaintiff's schedule of rates, no recovery can be had in the action. The contract, so far as shown, contained no stipulation against assignment, nor any provision which expressly or impliedly forbade performance by another. Furthermore, there was nothing to show that the skill or other quality peculiar to the power company, or the nature of the service, was a material inducement to the contract. Similar contracts have been held to be assignable. * * * And it appears that appellant, with knowledge of the facts and without objection, except as to the rate charged, accepted deliveries from the plaintiff and made monthly payments on account. Such circumstances sufficiently indicate a waiver of objections to the assignment. * * * When by authority of the commission the power company assigned its interest in the contract to the plaintiff, copies of both the assignment and contract being then on file, the contract, as the effect of the transaction, became a part of plaintiff's filed schedule of rates, and it was unnecessary to file the original instruments, unless required by the commission, which is not contended to have been the case."

Where a certificate of convenience and necessity is issued as a matter of course upon the filing of an application, the sale and transfer of the property is effected without the filing of such an application, because it is issued as a matter of course and may be obtained by the purchaser, as is indicated in the case of *Wall v. Smart*, 150 Wash. 333, 272 Pac. 711, where the court said: "Appellant excuses his failure to have the limitations entered on his certificate by saying that it was a vain and useless thing to do, and it seems to us that his excuse is sufficient. The trial court found that the contract between the parties was fully performed by respondent in every material particular, with which finding we concur. We are of the opinion that

appellant received everything of value which he was entitled to demand under his agreement with respondent. He received just as much as he would have received had the limitation referred to in the agreement between the parties been entered by the state department of public works upon respondent's certificate of necessity. Under the decisions of the Supreme Court of the United States, the issuance by the department of public works of Washington of a certificate of convenience and necessity to a common carrier engaged only in interstate commerce seems to follow as a matter of course upon the filing of an application therefor. We are unable to find any basis for the claim that the limitation upon respondent's certificate, had the same been noted thereon by the department of public works, would have been effective for any purpose whatsoever."

In granting its consent to the sale of property providing public utility service, the public service commission may and should inquire into the reasonableness of the price paid for the property, because of the fact that such price is finally reflected in the rates for the service. Because the proper determination of a rate case should precede the investigation and approval of the purchase-price of the property due to the connection between the two matters, the court refused to sustain the action of the public service commission in approving such a sale before making such investigation and determination, in the case of *Brookville v. Public Service Comm. (Pa.)*, 157 Atl. 513, saying: "Not only the rights of the immediate parties to this sale are involved, but the public's interest is to be protected, and it may be detrimentally affected if an excessive consideration is paid. The purchaser is assuming the debts of the Solar Electric Company, but the record is silent whether the price is fair or exorbitant. The debts may be utterly disproportionate to the value of the property. It is not unreasonable to conclude that the amount of the investment will call for a corresponding return in dividends and it may fairly be assumed that their payment would fall finally on the consumers in the borough. Whether the consideration is commensurate with the fair value of the property is therefore an essential fact which should have been found and not ignored. * * * We do not hold that the filing of a complaint against the rates of one of the companies involved, subsequent to an application for a merger, would necessarily delay the approval thereof, unless it appears that the rate proceeding was brought in good faith and on reasonable grounds, and that the proposed merger would substantially affect it. Nor

do we intimate that the present rates are unjust and unreasonable, but, in view of the various proceedings dealing with the supplying of electricity in the Borough of Brookville, which have been vigorously contested, and of the financial matters to which we have referred, we feel that it is only just and proper that the commission should have disposed of the rate case, which is so intimately related to the present proceeding, before approval of the sale of the property and franchises of the Solar Electric Company to the Pennsylvania Electric Company, and that proof should have been made that the assumption of the debts was a fair and reasonable consideration. The order of the public service commission is reversed, and the record is remitted to the end that the fair value of the property may be determined and the rate case disposed of before passing upon the approval of the sale."

§ 451. Franchise personal to grantee and not transferable.⁵—That the franchise rights of such a corporation to use the streets and highways to furnish municipal public utility service can not be transferred without express legislative authority is due to the fact that such rights are special privileges accorded to the particular grantees receiving them and are in that sense and for that reason personal, which limits their exercise to the parties to whom they are granted. This principle is well expressed in the case of *McCarter v. Vineland Light & Power Co.*, 72 N. J. Eq. 767, 70 Atl. 177, decided in 1909, where the court enjoined the extension of gas mains by the purchaser of a gas plant at a receiver's sale, because the right to make such extensions and to operate the plant was limited to the parties originally receiving the grant of this privilege, and the legislature having given no authority to transfer them, the purchaser at the receiver's sale did not acquire these franchise rights. In the course of its opinion the court said: "The rule must be considered settled that no person or corporation can acquire a right to make a special or exceptional use of a public highway, not common to all the citizens of the state, except by grant from the sovereign power. We think the defendant company had acquired no right to make the extensions enjoined, because it had no grant from the state. We have pointed out that it was organized under the general corporation act, and claims its right to use the streets as lessee of the franchise of the Vineland Gaslight Company acquired by the latter company by P. L. 1870,

⁵ This section of third edition v. *Detroit City Gas Co.*, 230 Mich. cited in *Walker Bros. Catering Co.* 564, 203 N. W. 492.

p. 577. Although, technically speaking, franchises are property, they are property of a peculiar character, arising only from legislative grant, and are not subject to sale and transfer without the authority of the legislature. We find no legislative authority for the conveyance of the franchise by Forrum to Holbrook, from the latter of whom the defendant claims title."

Where, however, the franchise is expressly issued to the grantee, its successors and assigns, alienation is permitted because in effect it is expressly authorized, for as the court said in the case of *Traverse City v. Citizens Tel. Co.*, 195 Mich. 373, 161 N. W. 983, P. U. R. 1917E, 962: "This franchise ran to the Northern Telephone Company, 'its successors and assigns.' Of its right to sell its property, franchise, and privileges to any other telephone company organized under like laws there can be no question. *Telephone Co. v. City of St. Joseph*, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. 520; *Telephone Co. v. Railroad Commission*, 174 Mich. 220, 140 N. W. 496. Defendant is the successor and assign of the Northern Telephone Company and the contention that it is a stranger to the franchise because it was not in express language nominated in the instrument of transfer from the Northern Company is not tenable under the undisputed acts of recognition and other facts shown. *Mahan v. Michigan Telephone Co.*, 132 Mich. 242, 93 N. W. 629; *Wichita v. Old Colony Trust Co.*, 132 Fed. 641. Defendant's right under its primary franchise from the state to use highways within the state for extension of its lines does not relieve it of contractual obligations arising from a secondary franchise granted by the municipality in which it is operated. Its obligations under that franchise are the same as were its grantors."

§ 452. **Combination agreements defeating competition invalid.**—Furthermore the courts will not permit such a corporation to disable itself from serving the public adequately and on reasonable terms and conditions by combining with a competing corporation rendering similar service, for the natural effect of such a combination, in the absence of proper regulation and control, is to destroy competition and enhance the cost of the service or impair its efficiency; although where there is adequate regulation and control of the service and its cost, such a combination can be justified and has been permitted by the courts, for the reason that a more comprehensive and systematic service can be secured in this way, and, in most cases at least, at an actual reduction of the operating expenses. The Supreme Court of Washington in the case of *Theis v. Spokane Falls Gaslight Co.*,

49 Wash. 477, 95 Pac. 1074, decided in 1908, in the course of its decision on this point, said: "A corporation can not combine with itself, nor can it combine with another without cooperation on the part of that other. By the enactment of the ordinance giving the Union Company authority to combine with the Spokane Company, the city authorized the latter to enter and be a party to such combination, or at least estopped itself from asserting a forfeiture on account thereof. * * * We think the old company had authority to purchase from the new any gas it deemed necessary or advisable, so long as it did not pay too much therefor, and there is no question of that kind here."

§ 453. **Contracts fixing rates or combining competitors invalid.**—The Supreme Court of the United States in the case of *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. 553, decided in 1889, furnishes an excellent statement of the rule as well as the reason upon which it is based refusing the right of municipal public utilities to combine or, by agreement without legislative consent, to withdraw or abandon their service to the public. That such would be inimical to the public interests is recognized by the court, and for this reason the principle denying the right by combination or otherwise to abandon the service to the public is not permitted by any of our decisions, for as the court in this case said: "It will be perceived that this was an agreement for the abandonment by one of the companies of the discharge of its duties to the public, and that the price of gas as fixed thereby should not be changed except that in case of competition, the rate might be lowered by one, but not below a certain specified rate, without the consent of the other. * * * The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. * * * Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi-public character, which are manifestly prejudicial to the public interest, can not be upheld. * * * It is also too well settled to admit of doubt that a corporation can not disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests."

§ 454. **Stock control of competing concerns invalid.**—Nor will the courts permit the combination of competing municipal public utilities to be brought about indirectly or under cover by the purchase of a controlling interest in the one by the other because the purpose and effect of such a purchase would be to destroy competition with the natural result that the public interest would suffer by the exaction of a higher rate for the service rendered or by the rendition of less adequate service, for as the Supreme Court of Illinois in the case of *People v. Union Gas & Electric Co.*, 254 Ill. 395, 98 N. E. 768, decided in 1912, said: "To sustain appellant's position would be, in effect, to hold that one public service corporation might, by contract with a competing public service corporation, divest the competing corporation of the power to exercise its franchise and by tying up its stock prevent such competing corporation from again engaging in business. * * * It seems plain that in seeking to invest itself not only with the street rights of but also the control over the two existing companies, its object was to suppress competition. This court held, in *Dunbar v. American Tel. Co.*, 224 Ill. 9, 79 N. E. 423, 115 Am. St. 132, 8 Ann. Cas. 57, that one corporation can not own stock in another corporation, and an attempt to do so, by purchasing in the name of another or having the legal title held in the name of another for the benefit of the purchasing corporation, is contrary to law and the public policy of this state."

§ 455. **Forced sales of public utility property.**—These cases, then, will serve to show the general rule of law, together with the practicable limitation placed thereon by our courts, which refuses to find power in such corporations by implication to sell the property used in serving the public, except in those cases of municipal corporations when the public interest no longer necessitates its continued holding. And it should be noted, also, that the rule is not limited to cases of voluntary sales but that such property when used for public purpose is not subject to forced sales on execution.⁶

The case of *Sun Printing & Publishing Assn. v. New York*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788, is an interesting illustration of the principle that the municipality, when expressly authorized, may lease such a public utility as a rapid transit system owned by the city to private parties for operation.

⁶ *Dillon, Mun. Corp.* (5th ed.), § 991, 5 Am. & Eng. Ency. Law, 1068, and cases cited.

Public utility property which is no longer useful because it can not be operated for profit may be disposed of, however, for as the court in the case of *Bullock v. State of Florida*, 254 U. S. 513, 65 L. ed. 380, 41 Sup. Ct. 193, P. U. R. 1921B, 507, held: "Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396, 64 L. ed. 323, P. U. R. 1920C, 579, 40 Sup. Ct. 193. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the state, and have been allowed to exercise the power of eminent domain. Suppose that a railroad company should find that its road was a failure, it could not make the state a party to a proceeding for leave to stop, and whether the state would proceed would be for the state to decide. The only remedy of the company would be to stop; and that it would have a right to do without the consent of the state if the facts were as supposed. Purchasers of the road by foreclosure would have the same right."

That forced sales may now be sustained because of state commission control is indicated in the case of *State v. Sunset Tel. & T. Co.*, 86 Wash. 309, 150 Pac. 427, L. R. A. 1917F, 1178, P. U. R. 1915F, 947, as follows: "The ordinance forbids any sale or transfer of the franchise and telephone system, except to a corporation to be organized by the original grantee, which was effected by and with the express consent of the city formally expressed in its subsequent ordinance No. 2694, by which the Home company became the franchise holder. The clause against alienation contained in section 14, Ordinance No. 2522, expressly forbade transfer to any other telephone company, without the consent of the city; the purpose evidently being to maintain competition in telephone service and prevent monopoly. The relator maintains, and was sustained therein by the trial court, that this condition was absolute, and prevents and avoids even an involuntary transfer by operation of law. In general, the provision was a valid condition with valid reasons to support it, and was an agreed provision of the contract. It was not, as appellant supposes, void as against public policy, nor ultra vires and void, as beyond the corporate power of the city. But we know of no case where any such condition has been held to defeat a transfer purely in invitum. Relator makes no pretension, in pleading or argument, that the foreclosure and sale under the deed of trust were collusive or colorable. There are many cases to the effect

that covenants not to assign during the term of a lease, where the covenant is well known to be for the benefit of the landlord's right to personally select his tenant, will not be held to prevent a transfer, by operation of law, as by judicial sale, where there is no indication that the proceedings are voluntary and collusive, or colorable. A case directly to the point is *Detroit v. Mutual Gas Co.*, 43 Mich. 594, 5 N. W. 1039. There, as here, a company accepting a franchise, coupled with a covenant not to assign or transfer, mortgaged its property and franchise, and the mortgage was defaulted, foreclosed, and the franchise and property sold under the foreclosure. The court there held that the condition against alienation did not avoid the transfer. * * * Upon principle and precedent, therefore, we are agreed that the involuntary transfer of the Home company's franchise and property through judicial sale and by operation of law did not give rise to a cause of forfeiture against a purchaser in good faith. * * * In these days ample and effectual regulation and control of all such public utilities obtain by and through the state's mandatory agencies, both as to economy and as to conveniences. The old clamor for competition and against monopoly in public utilities of almost every character has largely ceased, and the fundamental reasons therefor, in general, have vanished, under public regulation. Monopoly of service in public utilities no longer terrifies. Economy of service and of cost to the public, together with the highest kind of efficiency and adaptability to use, is now demanded and enforced."

Municipal property, because it is public, when used in a governmental capacity, is not subject to sale for the satisfaction of a municipal debt, any more than such property is generally taxable, as is indicated in *Board of Councilmen v. White*, 224 Ky. 570, 6 S. W. (2d) 699. In this connection it is pertinent to observe that the acts, undertakings, and engagements of municipal corporations are as follows: "(1) Those in furtherance of strictly governmental powers conferred or delegated either expressly or by necessary implication by their charters; (2) those which it may or may not exercise under authority from its charter in carrying out its strictly local municipal adventures; and (3) those which it sometimes performs in a strictly private capacity." The court continued: "Coming now to the question involved in this case, we find the law to be that all property of a municipal corporation acquired for and devoted to any of the public uses for the carrying out of which it may levy and collect taxes and included in either classifications (1) or (2), *supra*, is

exempt from levy and sale under execution in satisfaction of the debts of the municipality, but the authorities likewise hold that 'strictly private' property of a municipal corporation may be appropriated by judicial process to the satisfaction of its debts.

* * * It was alleged in the answer and admitted by the demurrer thereto that the house and lot had long since been acquired by the city in its strictly governmental capacity and was now being used as a place of storage for tools and implements necessary in maintaining and repairing the public streets of the city. It was clearly not subject to seizure and sale for the satisfaction of plaintiff's judgment under any sort of judicial process, and the court did not err in so exempting it. * * * The conclusion seems to be inevitable that if the defendant, city of Frankfort in this case, erected and equipped the opera house, the rents from which are sought to be appropriated to the satisfaction of plaintiff's judgment, in the circumstances and under the conditions permitting private corporations to do likewise, then it was not unlawfully acquired, and neither it nor the income therefrom may be classed as 'strictly private' property, which may be subjected to the satisfaction of plaintiff's judgment."

The sale of an ice plant which would do more damage to the electric branch of the plant than the ice plant was worth is invalid, because the effect of such a sale would seriously interfere with the continued operation of the electric plant, as was stated in *Cooper County Bank v. Bank of Busceton*, 221 Mo. App. 814, 288 S. W. 95, where the court said: "The referee in bankruptcy [held] * * * that the ice plant upon which alone the deed of trust was valid could not be removed from the premises without more damage to the electric plant and the building housing the same than the ice plant was worth. It was also urged as a defense that plaintiff, as the owner of the deed of trust in controversy, failed to procure its validation by the public service commission. We find no law, nor are we cited to any, whereby the public service commission is given power to validate a deed of trust which is void under the statute. The statute declares that an encumbrance made other than in accordance with the statute is void, and, being void, the commission is not authorized to make it valid. * * * It is urged by defendant that the deed of trust upon the property of the light company, which is not necessary or useful in the performance of duties to the public, is valid, and that plaintiff has failed to exhaust such security. But we think this position not sound for the reason, above stated,

that the matter was in the hands of the trustee in bankruptcy, and such trustee ruled to the contrary."

In holding that property constituting a municipal waterworks system, the same as school houses, parks, and other public buildings, is public, because it is acquired at public expense and for the common benefit of the inhabitants of the municipality in whom the title really rests, although it is actually held in trust in the name of the municipality, may not be seized to satisfy municipal debts, because it belongs to the inhabitants rather than the municipality, and, as a matter of public policy, may not be taken to satisfy municipal debts, the court said in the case of *Farmerville v. Commercial Credit Co. (La.)*, 136 So. 82: "The property involved in this litigation is a necessary, indispensable part of the waterworks plant of the town of Farmerville. The funds with which this plant was constructed were raised through a bond issue voted by the taxpayers of the town, as authorized by section 14, article 14 of the Constitution of 1921 and by Act No. 46, Extra Session of 1921. * * * As pertinent to the issues involved in this case, it is important to note that both in the constitution and the act, waterworks, public parks, school-houses, and other public buildings are referred to as public improvements for public purposes. As public utilities, waterworks plants, parks, and buildings are apparently placed in the same category as being public improvements, public property, title to which is in the public. They are built at public expense for the benefit and advantage of the inhabitants of the municipality, and are dedicated to public use. * * * They are owned by the public. The town in its corporate capacity, as a fictitious person, is merely the representative of the inhabitants. In such capacity, it merely holds such property as trustee and administers it as agent for the use and benefit of the public. This waterworks plant being strictly public property is out of commerce and can not be subjected to seizure and sale for the debts of the town. * * * A municipality may, of course, own property which is not and can never be needed for strictly municipal or public purposes; and property which, though once dedicated to and used for such purposes, is abandoned as a public utility. Such property may be treated as the private asset of the municipality and may be levied on and sold under execution for the debts of the corporation. But property not owned by the municipality in its corporate capacity, but by the public, the inhabitants, dedicated to public use, is not subject to seizure and sale for the debts of the municipality as long as it is so used.

It is exempt as a matter of public policy. * * * The water-works plant was built with the proceeds of a bond issue voted by the taxpayers under laws which expressly provide that all such 'public works' shall belong to the public. The town of Farmerville, as a political corporation, has no ownership in or title to the property. Its only function with reference thereto is to hold it in trust and administer it for the service, use, and benefit of those they represent, those who own it, the inhabitants. The debt represented by the notes here involved is a debt of the town and not of the inhabitants of the town. * * * The granting of liens on public property is against public policy."

§ 456. **Right of alienation expressly given by statute valid.**—In the case of *Bailey v. Philadelphia*, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837, 63 Am. St. 812, decided in 1898, the Supreme Court of Pennsylvania pretended to find by implication the power in the municipality to lease its gas works on the theory that the city owned such property as a business corporation, and from this fact concluded that the city was not required by its municipal duty under the statute to supply its citizens with gas for lighting. The court, however, found that "the right of alienation is given in express words in the charter." In so far as the actual decision of the case goes, in finding express statutory authority for the lease it is in full accord with the authorities, but the spirit of the case as shown by an extended argument which is obiter dictum is an unauthorized attempt to support the proposition that the municipality has inherent power to lease or dispose entirely of its gas plant and that it is under no duty to serve the public with such a public utility beyond its own pleasure. This doctrine, which the case suggested, is not supported by the authorities but is directly contrary thereto, and its adoption would be dangerous to the public welfare, nor does it seem to have been followed by any of our courts.

Transfers expressly authorized by state public utility laws especially when controlled by state commissions are valid for as the court said in the case of *State Public Utilities Comm. v. Romberg*, 275 Ill. 432, 114 N. E. 191: "The public policy of the state, as declared by section 22, article 4, of the Constitution, is not opposed to the elimination of competition in all cases, but only applies where a 'monopoly', in the sense which the word was used in the common law, would be thereby created, viz., where competition is eliminated by conferring upon a specified person or corporation the right to exclude all others from engaging in the same business, in the same field of operation, or

by upholding the validity of contracts and agreements which place it in the power of certain individuals or corporations to control production and fix prices, thereby resulting in injury to the public. No such consequences can follow the purchase by the American Company of a controlling interest in the Interstate Company under the authority conferred upon it by the State Public Utilities Act. The American Company will not, by this purchase, acquire the right to exclude any other person or corporation from engaging in the telephone business in the same field of operation, nor will it be within its power to arbitrarily limit the service to be furnished to the public, or fix the rates to be charged for the service rendered. The state possesses the right to exercise supervision over public utilities with reference to such matters, and has made provision for the exercise of such right through the state public utilities commission. Instead of resulting in injury to the public, the tendency of the elimination of the Interstate Company as a competitor of the Bell system would be to benefit the public."

The duty of the public utility commission in cases of such sales and transfers is well expressed in the case of *Hanlon v. Eshleman*, 169 Cal. 200, 146 Pac. 656, P. U. R. 1915B, 842: "The commission's power is to be exercised for the protection of the rights of the public interested in the service, and to that end alone. The sales, leases, or encumbrances affected by section 51a of the Public Utilities Act are dispositions of property of a public utility 'necessary or useful in the performance of its duties to the public.' The owner may not transfer such properties unless authorized by the commission. All that the commission is concerned with, therefore, is whether a proposed transfer will be injurious to the rights of the public. If not, the owner may be authorized to make the transfer. With the rights of an intending purchaser the commission has nothing to do. Nor has it power to determine whether a valid contract of sale exists, or whether either party has a legal claim against the other under such contract. These are questions for the courts, and not for the railroad commission, which is merely authorized to prevent an owner of a public utility from disposing of it where disposition would not safeguard the interests of the public."

To the same effect the court defined the duty of the commission in the case of *Ex parte Birmingham*, 199 Ala. 9, 74 So. 51, as follows: "We take it that the reasonableness of the competition which the constitution intends to conserve depends on its effect upon the public interests, whether or not it makes reason-

able the cost of the commodity furnished to the consumer. Competition in some circumstances may amount to needless economic waste in the duplication of investments and the cost of operation for which in the end the consuming public must pay. Hence a general drift of public opinion and legislative practice, consonant with the language and purpose of section 103, of the Constitution towards the supplanting of competition by the regulation of rates. This broad general policy of the state on this subject finds its latest expression in the act of August 6, 1915, and the policy so expressed is to commit the question of consolidations, such as the one here proposed, to the judgment and discretion of the public service commission."

Where there is ambiguity in the statutory provision, authorizing municipalities to sell their public utility systems without submitting the question to its voters and securing their consent to the sale, the court construes the statute most strictly in favor of the public to preserve municipal ownership. This principle is enunciated in the case of *South Texas Public Service Co. v. John* (Tex. Civ. App.), 7 S. W. (2d) 942, where the court said: "The controlling issue is whether, under article 1112, R. S. 1925, the city had the power to sell its electric street-lighting system without submitting the question to the electorate. The pertinent language of the article reads: 'No such light or water system shall ever be sold until such sale is authorized by a majority vote of the qualified voters of such city or town.' Appellants contend that the word 'such' limits the class of systems requiring for their sale the approval of the electorate to those which are revenue-producing and therefore capable of being encumbered. Appellees contend that 'such' refers to the general class of systems legislated concerning, namely, those municipally owned. We sustain the latter view. * * * The inhibition against selling a municipally owned plant without the consent of the electorate applies equally to those free from encumbrance as to those encumbered. The manifest purpose of the inhibition was to prevent disposition of such plants, and a consequent change from municipal to private ownership, without consent of the electorate, and this regardless of whether the system was in fact encumbered. It is a matter of common knowledge that many cities and towns have owned water and light plants, one or both, which supplied only municipal needs, such as street, park, and public building lighting, and fire protection and sanitation. These systems are a modern development. Originally at common law the supplying of water and lights for purely municipal purposes

was not a municipal duty. But, while no duty may rest upon the municipality in that regard, it is clearly a proper municipal function, and whether express legislative authority to its exercise is necessary is a question upon which there is some disagreement among the courts of this country. Furnishing light, power, and water to private inhabitant consumers, however, rests upon a different basis, and requires a legislative grant, express or implied. See note, 61 L. R. A. 3, et seq. Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41. It is generally held, however, that where a plant is authorized only for supplying municipal or otherwise limited uses, the municipality may sell excess power or water to private consumers. Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960; Crouch v. McKinney, 47 Tex. Civ. App. 54, 104 S. W. 518. * * * A different rule applies where the municipality owns the plant and the rates charged are not regulated by statutory restrictions or requirements. In such case it is quite generally held that a city may make a reasonable profit on its water or light system, and private consumers can not complain so long as the rates charged are reasonable; and their reasonableness is determined from the viewpoint of commensuration with the service rendered."

Under special legislative authority, a municipality may dispose of its public utility property, and in doing so may provide that the purchaser shall continue to furnish service and may grant a franchise for this purpose. In sustaining such a contract and in commending this form of sale as being for the best interest of all parties concerned, the court said in the case of McKiever v. Sumter, 137 S. Car. 266, 135 S. E. 60: "The city of Sumter has for several years owned its electric power and lighting plant, but decided to make sale of this property as allowed under an act of the legislature of 1925. * * * Indubitably, the purpose of the ownership of an electric power and lighting plant and ice plant by a city is to furnish the people of the city with electric power, light, and ice. It is entirely reasonable to suppose, therefore, that the authorities of a city, if they should make sale of such plant or plants, would make provision for the immediate necessities of the people of the city in the matters of power, light, and ice. It is difficult to see how this could be done in a more appropriate or effective way than through the making of a contract between the city and the purchaser for the furnishing of these necessities to the people. And it is to be observed that in this case the contract specifically provides that the rates fixed therein shall at all times be subject to regulation by the proper-

ly constituted state regulatory authorities. In addition, the making of such a contract by the city with the purchaser or purchasers doubtless would operate as an inducement to the purchaser for making the contract of purchase. The connection between the sale of such plant or plants by a city and the making of a contract for furnishing these necessities to the people is so close and manifest as to appeal to one's natural reason. * * * It follows that, in order that the purchaser may comply with such contract in the operation of the producing plant, it is necessary for him to have the right to use the streets and public places for erecting and maintaining his poles, lines, etc. This being true, the city or controlling board making such sale and contract as authorized by the act itself has implied power and authority under the act to grant to the purchaser a franchise for such purposes. * * * The franchise appears entirely reasonable as incident to the purchase and operation of the plant."

Where by contract a municipality agreed to sell its electric plant and to grant a franchise to operate the same for a fixed period of time, both by ordinances, in the passage of which no attempt was made to comply with the provisions of the statutes authorizing such action, because of a failure to give notice and for other reasons, the court set aside the action of the municipality and declared the ordinances null and void, because of their failure to comply with the statutory requirements, in the case of *Inland Utilities Co. v. Schell*, 87 Colo. 73, 285 Pac. 771, the court saying: "Defendants in error, residents, citizens, electors, and taxpayers in the incorporated town of Burlington, Colorado, on behalf of themselves and others similarly situated, sued plaintiffs in error, in equity, to enjoin the transfer by the town of Burlington to the Inland Utilities Company of its electric power system and the granting of a twenty-five-year franchise to operate the same. * * * The pleadings disclose that in adopting said ordinance no attempt was made to comply with the provisions of said sections. The publication required therein was not made. * * * By the express terms of this contract, the town of Burlington, acting by its trustees, agreed to sell to the Inland Utilities Company its electric power plant and a franchise to operate the same for a period of twenty-five years. By the passage of Ordinance No. 202, this contract was attempted to be ratified and approved. By the passage of Ordinance No. 203, the town officials sought by an election to have the voters ratify or disapprove the sale of the electric power plant and the grant of a twenty-five-year franchise to operate the same. Not-

withstanding the ingenious argument of plaintiffs in error that as a result of said election only the sale of the electric power plant was approved and no franchise to operate the same was thereby granted, in view of the specific and definite provisions of the contract and ordinances hereinabove referred to, we must conclude that the voters not only sought to authorize the sale of the electric power plant, but also to approve the provisions of said contract granting a franchise to the Inland Utilities Company to operate the same. Thus by indirection was sought to be accomplished the granting of a franchise which might not have been granted had the procedure prescribed by the statutes * * * been followed. An incorporated town is a creature of statute having only such powers, and the right to exercise the same only in such manner as authorized thereby. Ordinance No. 202 attempted to ratify the sale of the electric power plant and the grant of a franchise to operate the same. Ordinance No. 203 attempted to authorize a submission to the voters of Burlington of the question of whether or not its electric power plant be sold and a franchise be granted. In adopting said ordinances, the procedure provided by section 9173 of the statute was not followed, and they are therefore null and void."

Under proper statutory authority a municipality may sell its public utility plant without submitting the question for the approval of the voters where there is no requirement in the statute that this be done, for as the court said in the case of Byrd v. Alma, 166 Ga. 510, 143 S. E. 767: "This provision of the statute does not by its own terms expressly or impliedly provide for a contest of an election held under the terms of the act, before the ordinary of the county. * * * If a municipality owning an electric plant which it desires to sell, and having an opportunity to make a sale thereof on condition of complying with the Act of 1925, has authority to make the sale, and causes the required notice of sale to be published, and, after filing of objections by protestants against the sale, an election is held, and the returns of the election show a sufficient number of affirmative votes to authorize the sale, and the result is declared, and certain of the protestants file a petition with the ordinary to contest the election, the effect of which is to delay or prevent consummation of the sale of the property to the contemplated purchaser, equity will entertain a petition on the part of the city against the ordinary and the protestants, to prevent further entertainment or prosecution of the so-called contest of election before the ordinary. * * * Giving due effect to this

proviso, when the Act of 1925 is construed, as it must be, in connection with the acts creating the charter of the city of Alma, that city has authority to sell its electric light plant without the necessity of submitting the question of sale to the voters of the city. The city of Alma having the power just stated, it is immaterial to the case under consideration whether the election called by the city, at which the question of sale was so voted upon, was void."

In permitting the sale or merger of public utility plants, the public service commission, in passing on the valuation of the plants for such a purpose, may first determine the proper valuation of such plants for rate-making purposes, for as the court said in the case of Brookville v. Public Service Comm. (Pa.), 160 Atl. 856: "Although the public service commission, in approving the merger, stipulated that it should not be bound by approval of the sale to accept 'the amounts stated in the record of the instant proceedings as the value and/or costs of the plant and works and other property of the Solar Electric Company,' the superior court correctly states that all questions affecting the value were proper subjects of inquiry in the proceeding, which the commission should not have refused to find; and that, as a practical matter, the rate case should be determined before the merger takes place, there being no assurance that accounts would be kept afterward which 'would reflect the earnings and disbursements of * * * the Solar Electric Company, distinct from the gross earnings and disbursements of the Pennsylvania Electric Company.' Judge Baldrige points out that 'the parties affected by this litigation, which has run through a series of proceedings, have already had a heavy financial load to carry; it (which) ought not to be made more burdensome.' So far as appears, disposition of the merger case before the rate case would result in making it more difficult to arrive at the true facts in the rate case, and the actual result of insisting on such a procedure would be to obstruct justice."

CHAPTER 19

RIGHTS ON EXPIRATION OR FORFEITURE OF FRANCHISE

Section	Section
460. Property not forfeited with franchise.	471a. Determination of title to property placed in streets.
461. Right to retake possession coupled with property.	472. Title to property not affected by expiration of franchise.
462. Practical disposition of property on expiration of franchise.	473. Right to retake property necessary to enjoy its ownership.
463. Property and franchise rights may be forfeited by agreement.	474. Plant should not be dismantled but transferred.
464. Forfeiture for nonuser after reasonable time.	475. Franchise renewed or plant purchased by municipality.
465. Nonuser resulting in forfeiture reopens field.	476. Right to remove equipment on forfeiture.
466. Trespasser if necessary franchise not secured.	477. Trespasser on expiration regardless of investment in Ohio.
467. Franchise rights must be accepted in reasonable time.	477a. Service obligation terminates on franchise's expiration.
468. Acceptance of franchise and rendering service necessary.	478. Impracticable to treat as trespassers on expiration of franchise.
469. Forfeiture follows failure to perform if statute self-executing.	479. Agreement express for revocation and removal.
470. Forfeiture or expiration of franchise waived—Estoppel.	480. Municipality must purchase or renew if franchise requires.
471. Provisions of municipal franchise modified by agreement.	481. State forfeitures.

§ 460. Property not forfeited with franchise.—When the special franchise privileges of occupying the streets, highways and other public places and of owning and operating a plant to provide a public utility service have expired or been forfeited, the municipal public utility is not by virtue of that fact deprived of its property nor can such property be confiscated, nor does it escheat to the state or to the particular municipality. On the expiration of such franchise rights or at their forfeiture the rights of the municipal public utility to whom they were granted are not then and thereby terminated to its own property. The rights of the municipal public utility to its property have coupled with them the additional right or privilege of entering upon the streets for the purpose of taking possession and re-

moving the property within such time after the termination of the franchise as may be reasonably necessary for doing so. The expense of its removal and the loss in value of this disposition of such property makes this action almost prohibitive.

Where a franchise contract has expired according to its terms, neither the municipality, the railroad commission of the state, nor the courts may require the public utility to continue to render service, and an ordinance to that effect is ineffective for the purpose. Title to the property remains in the public utility and is subject to its disposal, although in practice this may cause serious inconvenience to the public in being deprived of service and a substantial property loss to the utility in removing its property, all of which illustrates the advantages of a continuous franchise, or indeterminate permit. This decision and the reasons for it occur in the case of *Ludlow v. Union Light, Heat & Power Co.*, 231 Ky. 813, 22 S. W. (2d) 909, where the court reasoned as follows: "The grant and acceptance of a franchise is but a contract, and its obligations are binding on both parties. A contract expires according to its terms. In accordance with the constitutional limitation, the contract entered into between appellant and appellee in 1909 expired at the end of twenty years. There was no contractual relation between the parties after that period. *Board of Education of Somerset v. Kentucky Utilities Co.*, 231 Ky. 484, 21 S. W. (2d) 817. It is universally held that, when a franchise contract terminates, the mutual rights and liabilities are at an end. The property used by the franchise owner does not cease to be its property, and it has the right to remove it from the streets, and, upon failure to exercise that right, may be compelled to do so. However, the courts in the interest of justice and equity have held that a reasonable time should be given for the removal of the physical properties, for, obviously, there could be no instant removal on a discontinuance of the service; also under some circumstances courts of equity have interposed their powers to prevent a discontinuance of service for the time being, as has been done in this very case, until the rights of the parties could be fully adjudicated. * * * The question sharply presented is: Can the city coerce the gas company into the making of a contract with it upon reasonable terms? The fact that the appellee is engaged in selling a commodity which has become a great public convenience and has available means for its delivery does not thereby make the company different from other parties competent to enter into any other kind of a contract. The courts

do not have such power of coercion, any more than they have the power to arbitrarily compel the city to enter into a contract concerning which it may exercise its own will and discretion.

* * * This case must be decided upon the same principles as was *Union Light, Heat & Power Co. v. Ft. Thomas*, 215 Ky. 389, 285 S. W. 228. That is a parallel case and controlling authority. The court has no disposition to depart from it, for it is based upon reasons cogent and logical, and principles equitable and sound, although, because of the particular situation, inconvenience and hardship may have resulted to the citizens. * * * For the reasons already given, the court is of the opinion that the city was without authority to enact that ordinance, and that it is invalid and ineffective. * * * After our decision in the *Ft. Thomas* case, the city appealed to the railroad commission for relief, and it entered its order directing a continuance of the service. The company sought an injunction in the United States district court (17 Fed. (2d) 143), prohibiting the enforcement of the order of the commission. The case was heard by a statutory three-judge court, composed of Judges Moorman, Dawson, and Hicks. That court enjoined the commission from enforcing its order, on the ground that any act on its part to force a continuation of the service after the expiration of the franchise would be writing into the contract an obligation which the company did not assume, and hence would violate the provisions of the United States Constitution relating to the impairment of a contract, and would as well be depriving the company of its property without due process of law. It also held that the construction of the act contended for by the city, namely, that the railroad commission has the power to compel and regulate service within the municipality would be in effect to say that the general assembly had the right to confer upon the commission the power to set aside the mandatory constitutional provisions of sections 163 and 164, which took away from the legislature the power to grant local franchises and expressly vested that power in the municipality. * * * In conclusion, answering the questions propounded as to a declaration of rights, and as a resume of the opinion, it may be said: (1) That the city, in the absence of a franchise, can not compel the company to continue its service, and, consequently, has no right to fix the rate at which the service should be rendered (except, of course, in a franchise regularly created); (2) the railroad commission of the state is without jurisdiction in the matter; and (3) the company does have the right to withdraw its service."

§ 461. **Right to retake possession coupled with property.**—Indeed it is to the interest of the municipality and its inhabitants that the property of the municipal public utility remain in position for a time at least after its franchise rights terminate for the purpose of continuing its service until service is provided by another or until another franchise can be agreed upon between the municipality and the corporation furnishing the service. Naturally the rendering of the service until the termination of the franchise requires the occupation of the streets with the necessary equipment during the entire period and as this can not be interfered with or removed without interrupting the service due the municipality and its inhabitants until after the expiration of the franchise period, it is necessary to allow a reasonable period after the expiration of the franchise within which such equipment may be removed or another franchise agreement entered into.

§ 462. **Practical disposition of property on expiration of franchise.**—Where under the terms of the franchise the municipality has the right to purchase the property at a fixed period, the title does not pass to the municipality at the time fixed unless the city exercises its right to purchase and pays or tenders the reasonable value of the plant or the particular amount if it has been fixed and determined in the franchise. And in case the municipality does not exercise its right to purchase but permits the municipal public utility to continue to furnish the service, it can scarcely be regarded as a trespasser although some of the cases have so held. The expiration of the franchise terminates the contractual relation created by it so that neither party can be compelled without its consent to renew the contract nor required to furnish or accept service beyond a reasonable time within which other arrangements for service may be made. The right of the corporation providing the service to remove its equipment is unquestioned and the enjoyment of this right requires the holding that it is coupled with an interest permitting the owner of the property to enter upon the streets of the municipality for the purpose of removing its plant and equipment. This necessarily results in an extravagant waste of property due to the excessive cost of removing the property as well as the consequent expense of repairing the streets and the depreciated value of the property when removed. As all this expense must be charged to the cost of service by the municipal public utility rendering it, the interest of the public obviously demands that such expense be avoided by the continued use of the plant under

a renewal of the franchise or a purchase by the municipality or other capital.

§ 463. **Property and franchise rights may be forfeited by agreement.**—The parties to the agreement contained in the franchise, however, may by express stipulation provide that the franchise privileges shall terminate in case the municipal public utility service is not furnished within a fixed period or in accordance with stipulated conditions. The municipality may take the precaution of securing the performance of the service to be rendered by such provisions and the terms of some franchise grants expressly stipulate that the property as well as the franchise rights of the corporation shall be forfeited to the municipality in the event of the failure to render the service within a fixed time or in accordance with the stipulated conditions. In the absence, however, of such express stipulation the right of the municipal public utility to its property is not affected by the expiration or forfeiture of the franchise privileges any more than the property of any corporation is forfeited on the expiration of the term of its corporate existence. The property of the corporation belongs to it separate and independent of its special franchise rights by which the municipality grants its consent to the furnishing of the service by the corporation and to the use of its highways for that purpose. The working of a forfeiture of such rights in this connection as in cases of forfeiture generally is not favored by our courts and franchise rights will not be forfeited except in cases clearly justifying it.

§ 464. **Forfeiture for nonuser after reasonable time.**—Where, however, the municipal public utility fails or refuses for an unreasonable time to install its plant and provide service, the courts will not hesitate to declare its special franchise privileges to be forfeited on account of their nonuser. Where the franchise expressly stipulates as a condition precedent to its use and enjoyment that the municipal public utility plant shall be installed and the service begun by a certain time or within a fixed period after the granting of the franchise rights and as a condition precedent to their enjoyment, the courts will declare such rights to be forfeited in case of a failure on the part of the municipal public utility to comply with such express stipulations in the franchise, and on the request of the municipality will enjoin any attempt on the part of the municipal public utility thereafter to install its system and render service. Such a holding by the courts is not unreasonable because it is only giving

effect to the stipulations expressly made in the contract or construing its terms in a reasonable, practical manner in the interest of the municipality and its inhabitants. So long as any part of the franchise remains outstanding it necessarily interferes with, if it does not prevent, the granting of the same or similar franchise rights to another corporation through which the service might be secured in case it is not furnished under the franchise first granted which necessitates the decree of the court forfeiting the first franchise in the event its privileges are not exercised and the service furnished under and by virtue of its provisions.¹

¹ United States. Cleveland Elec. R. Co. v. Cleveland & C. R. Co., 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. 202; Omaha, Nebraska v. Omaha Water Co., 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. 615, 48 L. R. A. (N. S.) 1084; Denver, Colorado v. New York Trust Co., 229 U. S. 123, 57 L. ed. 1101, 33 Sup. Ct. 657; New York Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 59 L. ed. 184, 35 Sup. Ct. 72, L. R. A. 1918E, 874, Ann. Cas. 1915A, 906; Denver, Colorado v. Denver Union Water Co., 246 U. S. 178, 62 L. ed. 649, 38 Sup. Ct. 278; Detroit United R. Co. v. Detroit, Michigan, 248 U. S. 429, 63 L. ed. 341, 39 Sup. Ct. 151; Detroit United Ry. v. Detroit, Michigan, 255 U. S. 171, 65 L. ed. 570, 41 Sup. Ct. 285; Bankers Trust Co. v. Raton, New Mexico, 258 U. S. 328, 66 L. ed. 642, 42 Sup. Ct. 340; Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 73 L. ed. 653, 49 Sup. Ct. 282.

Federal. National Water Works Co. v. Kansas City, Missouri, 62 Fed. 853, 27 L. R. A. 827; Boise City Artesian Hot & C. Water Co. v. Boise City, Idaho, 123 Fed. 232; Thompson v. Schenectady R. Co., 124 Fed. 274; Laighton v. Carthage, Missouri, 175 Fed. 145; Poccatello, Idaho v. Murray, 206 Fed. 72, affd. in 214 Fed. 214; Seattle R. & C. R. Co. v. Seattle, Washington, 216 Fed. 694; Stewart v. Ashtabula, Ohio, 107 Fed. 857; Puget Sound Trac., Light & C. Co. v. Tacoma, Washington, 217 Fed. 265; Henry L. Doherty & Co. v. To-

ledo R. & Light Co., 254 Fed. 597; Toledo, Ohio v. Toledo R. & Light Co., 259 Fed. 450; Gas & Electric Securities Co. v. Manhattan & C. Trac. Corp., 266 Fed. 625, dis. in 262 U. S. 196, 67 L. ed. 946, 43 Sup. Ct. 513; Winfield, Kansas v. Wichita Nat. Gas Co., 267 Fed. 47, P. U. R. 1921C, 353; Louisville, Kentucky v. Louisville Home Tel. Co., 279 Fed. 949; Quarles v. Appleton, Wisconsin, 299 Fed. 508; Pacific Tel. & T. Co. v. Seattle, Washington, 14 Fed. (2d) 877; Union Light, Heat & C. Co. v. Railroad Comm. of Kentucky, 17 Fed. (2d) 143, P. U. R. 1927C, 489; Security Trust Co. v. Grosse Pointe, Michigan, 32 Fed. (2d) 706; Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co., 33 Fed. (2d) 770, P. U. R. 1929E, 260; Harris Trust & C. Bank v. Chicago R. Co., 39 Fed. (2d) 958; Central Power Co. v. Hastings, Nebraska, 52 Fed. (2d) 487.

Alabama. Mobile v. Stein, 54 Ala. 23; Stein v. McGrath, 128 Ala. 175, 30 So. 792; State v. Birmingham Water Works Co., 185 Ala. 388, 64 So. 23, Ann. Cas. 1916B, 166; State v. Western Union Tel. Co., 208 Ala. 228, 94 So. 466.

Arizona. Bisbee v. Bisbee Improvement Co., 18 Ariz. 126, 157 Pac. 228.

California. Los Angeles R. Co. v. Los Angeles, 152 Cal. 242, 92 Pac. 490, 15 L. R. A. (N. S.) 1269, 125 Am. St. 54; People v. Los Angeles R. Corp., 168 Cal. 406, 143 Pac. 739; Lyon v. Railroad Comm., 183 Cal.

145, 190 Pac. 795, 11 A. L. R. 249, P. U. R. 1920F, 227; Oakland v. Great Western Power Co., 186 Cal. 570, 200 Pac. 395; Sierra &c. Power Co. v. Universal Elec. &c. Co., 197 Cal. 376, 241 Pac. 76; Mahoney v. San Francisco, 201 Cal. 248, 257 Pac. 49; Hatfield v. Peoples Water Co., 25 Cal. App. 502, 144 Pac. 300.

Colorado. Mountain States Tel. & T. Co. v. People, 68 Colo. 487, 190 Pac. 513; Lamar v. Wiley, 80 Colo. 18, 248 Pac. 1009, P. U. R. 1927A, 175.

Illinois. Chicago Municipal Gas Light &c. Co. v. Lake, 130 Ill. 42, 22 N. E. 616; Belleville v. Citizens Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681.

Indiana. Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495; Cumberland Tel. & T. Co. v. Mt. Vernon, 176 Ind. 177, 94 N. E. 714.

Iowa. Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 91 N. W. 1081, writ of error dis. in 199 U. S. 600, 50 L. ed. 327, 26 Sup. Ct. 747; Sac City v. Iowa Light, Heat &c. Co., 203 Iowa 1364, 214 N. W. 571; Mapleton, Inc. v. Iowa Public Service Co., 209 Iowa 400, 223 N. W. 476, P. U. R. 1929B, 359.

Kansas. Atchison St. R. Co. v. Nave, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 800; Keene Syndicate v. Wichita Gas &c. Co., 69 Kans. 284, 76 Pac. 834, 67 L. R. A. 61, 105 Am. St. 164, 2 Ann. Cas. 949; State v. Stafford, 92 Kans. 343, 140 Pac. 868; Elliott v. Empire Nat. Gas Co., 123 Kans. 558, 256 Pac. 114, P. U. R. 1927D, 751.

Kentucky. East Tennessee Tel. Co. v. Russellville, 106 Ky. 667, 51 S. W. 308, 21 Ky. L. 305; Potter Metlock Trust Co. v. Warren County, 182 Ky. 840, 207 S. W. 709; Hamilton v. Bastin Bros., 188 Ky. 764, 224 S. W. 430; Union Light, Heat &c. Co. v. Fort Thomas, 215 Ky. 384, 285 S. W. 228, P. U. R. 1927A, 691; Board of Education v. Kentucky Utilities Co., 231 Ky. 484, 21 S. W. (2d) 817; Ludlow v. Union Light, Heat &c. Co., 231 Ky. 813, 22 S. W. (2d) 909.

Michigan. Risser v. Hoyt, 53 Mich. 185, 18 N. W. 611; Detroit v. Detroit United Ry., 172 Mich. 136, 137 N. W. 645, affd. in 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. 697; Taylor v. Michigan Public Utilities Comm., 217 Mich. 400, 186 N. W. 485, P. U. R. 1922D, 198; Walker Bros. Catering Co. v. Detroit City Gas Co., 230 Mich. 564, 203 N. W. 492.

Minnesota. International Lbr. Co. v. American Suburb Co., 119 Minn. 77, 137 N. W. 395; State v. Brainard, 126 Minn. 90, 147 N. W. 712; State v. Duluth St. R. Co., 128 Minn. 314, 150 N. W. 917.

Missouri. State v. Public Service Comm., 310 Mo. 313, 275 S. W. 940; State v. Public Service Comm., 317 Mo. 724, 296 S. W. 998; State v. Public Service Comm., 317 Mo. 815, 296 S. W. 790; Great Northern Utilities Co. v. Public Service Comm. (Mont.), P. U. R. 1931E, 1.

New York. People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684; People v. Broadway R. Co., 126 N. Y. 29, 26 N. E. 961; Stillwater v. Hudson Valley R. Co., 255 N. Y. 144, 174 N. E. 306; People v. Public Utilities Comm., 255 N. Y. 232, 174 N. E. 637, P. U. R. 1931B, 168; Wakefield v. Theresa, 125 App. Div. 38, 109 N. Y. S. 414; New York Elec. Lines Co. v. Gaynor, 167 App. Div. 314, 153 N. Y. S. 244, affd. in 218 N. Y. 417, 113 N. E. 519; New York v. Interborough Rapid Transit Co., 232 App. Div. 233, 249 N. Y. S. 243, P. U. R. 1931E, 161; Fredonia v. Fredonia Natural Gas Light Co., 87 Misc. 592, 149 N. Y. S. 964, affd. in 169 App. Div. 690, 155 N. Y. S. 212.

North Carolina. Elizabeth City Water &c. Co. v. Elizabeth City, 188 N. Car. 278, 124 S. E. 611.

Ohio. Kinsman St. R. Co. v. Broadway &c. St. R. Co., 36 Ohio St. 239; Salt Creek Valley Turnpike Co. v. Parks, 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769; Toledo Consol. St. R. Co. v. Toledo Elec. St. R. Co., 50 Ohio St. 603, 36 N. E. 312; Cincinnati Inclined Plane R. Co. v. Cin-

On a failure of the company to perform the city may either compel performance or declare a forfeiture but it can not do both, for as the court said in the case of *Seattle, R. & S. R. Co. v. Seattle, Washington*, 216 Fed. 694: "The city upon the failure of the complainant to carry out the provisions of the franchise ordinance, if default was made, had two remedies: First, to compel compliance with the provisions of the ordinance; or, second, to declare a forfeiture of the franchise right. The election of one remedy with full knowledge is an irrevocable bar to the other. *The Fred E. Sander (D. C.)* 212 Fed. 545; *Thompson v. Howard*, 31 Mich. 309; *Achey v. Creech*, 21 Wash. 319, 58 Pac. 208; *In re Pederson's Estate*, 97 Minn. 491, 106 N. W. 958. * * * The city can not 'eat its cake and keep it, too.' The enforcement of the provisions of the franchise ordinance and repealing the ordinance are inconsistent, and both remedies can not be pursued. * * * The city can not derive any benefits from the franchise and yet rescind the ordinance which gives it life. The franchise must be nullified in toto or not at all."

§ 465. **Nonuser resulting in forfeiture reopens field.**—The New York Court of Appeals in the case of *People v. Broadway R. Co.*, 126 N. Y. 29, 26 N. E. 961, decided in 1891, furnishes a good statement of this rule and indicates the disadvantage under which the public would labor in the event the court had refused to declare the franchise forfeited for nonuser. In this case the defendant had failed for a period of twelve years to install and operate any of its street railway system and had de-

cinnati, 52 Ohio St. 609, 44 N. E. 327; *Wellston v. Morgan*, 59 Ohio St. 147, 52 N. E. 127; *Hamilton, G. & C. Trac. Co. v. Hamilton & C. Elec. Transit Co.*, 69 Ohio St. 402, 69 N. E. 991; *Gress v. Ft. Loramie*, 100 Ohio St. 35, 125 N. E. 112, 8 A. L. R. 242; *Mt. Vernon v. Berman*, 100 Ohio St. 1, 125 N. E. 116; *St. Clairsville v. Public Utilities Comm.*, 102 Ohio St. 574, 132 N. E. 151, P. U. R. 1921E, 459; *State v. Northern Ohio Trac. & C. Co.*, 104 Ohio St. 245, 135 N. E. 528; *Ohio Elec. Power Co. v. State*, 121 Ohio St. 235, 167 N. E. 877; *Lake Shore Elec. R. Co. v. State (Ohio St.)*, 180 N. E. 540; *Cleveland v. East Ohio Gas Co.*, 34 Ohio App. 97, 170 N. E. 586; *Parks v. Cleveland R. Co.*, 38 Ohio App.

315, 176 N. E. 472, *affd.* in 124 Ohio St. 79, 177 N. E. 28.

Pennsylvania. *Wilson v. Public Service Comm. (Pa.)*, 157 Atl. 497.

Texas. *Dallas R. Co. v. Geller*, 114 Tex. 484, 271 S. W. 1106; *Fink v. Clarendon (Tex.)*, 282 S. W. 912; *Fort Worth Gas Co. v. Latex Oil & C. Co. (Tex.)*, 299 S. W. 705; *Community Nat. Gas Co. v. Northern Texas Utilities Co. (Tex. Civ. App.)*, 13 S. W. (2d) 184.

Washington. *Tacoma R. & Power Co. v. Tacoma*, 79 Wash. 508, 140 Pac. 565.

West Virginia. *Wheeling & C. R. Co. v. Triadelphia*, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 321.

Wisconsin. *Eau Claire Dells Improvement Co. v. Eau Claire*, 172 Wis. 240, 179 N. W. 2.

faulted in doing so for a much longer period as to a large part of its system. In declaring the franchise rights forfeited on account of nonuser for such an unreasonable period in order to permit the municipality to grant similar franchise rights to other parties who would provide the necessary service, the court said: "But even if it were absolutely certain that the defendant could have made no profit by building the roads to the extent which we have * * * indicated, yet that is no answer to the proposition that it is the duty of the defendant to build them. It applied for this act, and accepted the franchise, and thus took upon itself the obligation and burden to exercise the franchises for the public benefit. If these routes could not presently be made profitable for railroad purposes, it should not have applied for the act; or, the act having been passed, it should not have accepted the franchises. * * * The power of the court to declare the franchises of the defendant forfeited for nonuser is undoubted. * * * This defendant should not stand in the streets of Brooklyn claiming franchises which for many years it refused to use, and thus bar out other railroads which might be constructed for public convenience and accommodation. If these franchises are of no value, it is not harmed by the judgment of the special term. If they are valuable, and of growing worth, it should have discharged its duty to the public by using them."

Where the public utility discontinues operation and disposes of its equipment, it then becomes a trespasser in the streets and the municipality may require the removal of its tracks as such, and also because it is a public nuisance; and on the failure of the public utility to remove its property and restore the surface of the street to its original condition, the city may proceed with the removal, and the cost of its doing so is an equitable lien upon the property, as is indicated in the case of *Stillwater v. Hudson Valley R. Co.*, 255 N. Y. 144, 174 N. E. 306, where the court said: "The village of Stillwater brought this proceeding to get rid of abandoned street railroad tracks on its principal thoroughfare, and to make the cost of their removal a preferred lien on the corporate property. * * * The Hudson Valley Railway Company, having abandoned its railroad, given up the operation of its surface cars by a formal resolution, and having sold and disposed of all its equipment, has deliberately failed and refused for over a year and a half to meet the terms and conditions upon which the consent to the use of Main Street was given. The action of the village is sufficient indication that it has now withdrawn that consent; in fact, the abandonment of all its opera-

tions and property by the railroad company under the conditions of this case has terminated its rights in the street. * * * 'Although the franchise is property, "it is subject to defeasance or forfeiture by failure to exercise it."' * * * This is not such a case, as we are dealing here with the consent of a village granted to the Hudson Valley Railway Co., to use its streets upon terms and conditions which it now fails and refuses to meet. The consent is at an end, and the tracks of the railroad company in the street are there without authority, and constitute a trespass or a public nuisance. They must be taken up. * * * The judgment directed to be entered by the appellate division requires the Hudson Valley Railway Company to remove its rails, ties, and poles on Main Street in the village of Stillwater, and, in the event of its failure so to do, the village is authorized to remove the property and restore the surface of the street to correspond to the remaining portion thereof. The expense of removing the rails, ties, and poles and span wires and restoring of the brick pavement is to be an equitable lien upon the property of the defendant, the Hudson Valley Railway Company."

§ 466. **Trespasser if necessary franchise not secured.**—That a municipal public utility which takes possession of the streets and other public places of the municipality without the consent of the proper authorities first secured permitting it to do so is a mere trespasser and has no more rights than a wrongdoer who takes possession of the land of another without his consent is the effect of the decision in the case of *East Tennessee Tel. Co. v. Russellville*, 106 Ky. 667, 51 S. W. 308, 21 Ky. L. 305, decided in 1899, where the court, in holding that in such a case the municipality is not liable for refusing to grant the necessary franchise rights to permit the municipal public utility to install its plant and furnish service where it had begun to do so under a grant made without authority, said: "At that time the councilmen of that city had no legislative authority, express or implied, which authorized them to grant such a privilege to him. He enjoyed no charter privilege which conferred upon him the right to occupy the streets and alleys of that city for the purposes stated. The date of the grant of the privilege shows that it was before the adoption of the present constitution. * * * It will be seen from this section of the constitution that no authority is vested anywhere to authorize any telephone company to construct its line on or across the streets and alleys or the public grounds of a city or town, except with the consent of the

proper legislative bodies or boards of such city or town. No such authority was obtained by Clark or the telephone company, and it necessarily follows that they had no right to enter upon the streets and alleys of the city for the purposes stated. To hold otherwise would be utterly to ignore and disregard the organic law of the state."

Where no franchise is secured in accordance with the terms of the municipal charter, although an ordinance was passed attempting to grant a franchise without a proper compliance with the city's charter, any expenditures by the public utility in such a case is at its own peril, because in dealing with the municipality the public utility must know and conform to the powers of the city. The situation is the same as though a franchise had been granted on certain conditions precedent, which had not been complied with, for as the court said in *Community Natural Gas Co. v. Northern Texas Utilities Co.* (Tex. Civ. App.), 13 S. W. (2d) 184: "As stated, Vernon is a home rule city, having adopted a charter under article 11, section 5, of the Constitution.

* * * It is clear from what has been said that the city never intended that franchise Ordinance No. 425 should become effective immediately. It is also apparent that, if the council had intended to make it effective immediately, their action would have been illegal and void. Under the charter provisions and the authorities cited, franchise Ordinance No. 425 could not become effective prior to September 3, or thirty days after the date of the last publication. * * * The weakness in appellant's contention under this and some related propositions is that appellant had no franchise and could have none until after the third day of September, 1926. The words 'with consent of the city,' as used in R. S., article 1436, mean in accordance with the city's charter, and not a consent which the city could give or did give in violation of its charter provisions. * * * No franchise having been legally granted appellant, estoppel can not be predicated upon preliminary proceedings to that end which never matured. Any expense incurred or work done by appellant prior to the ripening of its negotiations with the city into a contract was at its peril, because a party in dealing with the municipality is bound to know the extent of a city's powers. No petition for a referendum was ever presented to the city, and, of course, no referendum could be legally ordered in the absence of the performance of conditions precedent. * * * Under article 2, section 17, of the city charter, the appellant could not begin using the streets in laying its pipes unless it had permission evidenced

by a valid ordinance to do so. The resolution of July 27, 1926, permitting it to begin work upon the filing and approval of a bond for \$25,000, was a nullity, even though the bond had been approved, and the record shows no such approval. A city has the right to grant a franchise with conditions annexed. Pond on Public Utilities (3d ed.), sections 148, 183, 468, 469, and 500; 44 C. J. 222; 26 C. J. 1029, 1030. The G. M. Church franchise was granted upon conditions precedent. The grantee failed to comply with the conditions, resulting in a forfeiture, because of such failure. No action by the city to declare it forfeited was necessary. If no right vested, there was none to be forfeited by a suit, and its validity may be collaterally attacked because it is inoperative and void as a contract."

§ 467. **Franchise rights must be accepted in reasonable time.**—The granting of a franchise includes its acceptance by the grantee before it constitutes a contract and becomes a property right or interest vested in the grantee. Where therefore the offer of the municipality to grant the necessary franchise privileges to install and operate a municipal public utility is not properly accepted within a reasonable time by the grantee, no contract is created and no interest becomes vested because the franchise never became effective for it was never accepted by the party to whom the municipality offered to grant it. This is the effect of the decision in the case of Cumberland Tel. & T. Co. v. Mt. Vernon, 176 Ind. 177, 94 N. E. 714, decided in 1911, where the Supreme Court of Indiana said: "Unless the ordinance in question was accepted by the American Company before it executed the assignment, evidenced either by expressed words or some act or conduct on its part, the ordinance was nothing more than a mere proposition, and could confer no right nor impose any obligation on the company."² * * * During the period from February 20, 1899, to February 5, 1906, the American Telephone & Telegraph Company never made any attempt to construct or operate a telephone system in the city, and its only connection with the ordinance, as shown by the record, was the presence of one of its agents at the meeting of the council which adopted the ordinance, and the request by the agent that it should be passed. It is not shown that this agent was authorized by the company to accept the terms and conditions of the ordinance. The court would not have been warranted in inferring

² State v. Dawson, 16 Ind. 40; v. Dark, 175 Ind. 332, 92 N. E. 778; Cincinnati, H. & C. R. Co. v. Clifford, Abbott, Municipal Corporations, 113 Ind. 460, 15 N. E. 524; Jennings § 901.

from the facts disclosed by the evidence that the ordinance was ever accepted."

§ 468. **Acceptance of franchise and rendering service necessary.**³—In refusing to enjoin the defendant city from preventing the plaintiff corporation rendering the municipal public utility service from installing its equipment in its streets because of its failure to do so within the time stipulated, the Supreme Court of Illinois in the case of *Chicago Municipal Gas-Light & Fuel Co. v. Lake*, 130 Ill. 42, 22 N. E. 616, decided in 1889, in holding that it was not a sufficient performance of its stipulation to this effect to secure an assignment of a short-time lease from another municipal public utility which gave no assurance for the giving of its service permanently, said: "The company, by this acceptance of the ordinance, undertook to perform a service for the public benefit of the town and its inhabitants, in furnishing them with gas for illuminating and heating purposes; and it expressly contracted to commence furnishing gas to the town within one year from the date of the passage of the ordinance. * * * It was not the spirit and true intent of the ordinance of March 25, 1884, that the gas company should get the assignment of a short and merely provisional lease of gas works, and thereby fulfill the bare letter of its contract by commencing within the year to deliver gas to the town of Lake, without making any provision for the continuance of such service. It would be inequitable and unjust, upon so uncertain a term of its future gas service, to compel the town, against its will, to permit appellant to dig up and obstruct its public streets and highways, and occupy and use them, for the purpose of laying and maintaining therein its gas mains and gas pipes. It is settled doctrine that the courts will interfere by injunction with the acts of a municipal corporation, in respect to matters which are by the law placed within the power and left to the discretion of the corporation, only in a case of clear and undoubted right; and such a case, in our opinion, is not shown in the record now before us. We are unable to say that the decree of the circuit court refusing the injunction, and dismissing the bill, was erroneous."

§ 469. **Forfeiture follows failure to perform if statute self-executing.**⁴—That a judgment of forfeiture is not necessary where it is expressly provided for in the statute, which is self-

³ This section of third edition cited in *Community Nat. Gas Co. v. Northern Texas Utilities Co.* (Tex. Civ. App.), 13 S. W. (2d) 184.

⁴ This section of third edition cited in *Community Nat. Gas Co. v. Northern Texas Utilities Co.* (Tex. Civ. App.), 13 S. W. (2d) 184.

executing and which furnishes a complete justification for the municipality in refusing to permit a municipal public utility to install its equipment after having failed for four years beyond the stipulated time to build its plants and provide its service, is the effect of the decision in the case of *Los Angeles R. Co. v. Los Angeles*, 152 Cal. 242, 92 Pac. 490, 15 L. R. A. (N. S.) 1269, 125 Am. St. 54, decided in 1907, where the court said: "One of the express conditions contained in the ordinance granting the franchise was the following: 'If said road is not fully completed and in operation within said time, then this franchise shall be forfeited as to the portion thereof uncompleted.' * * * The ordinance provides that in case of a failure to complete the work within the time limited the franchise shall be forfeited, but, if this provision is not self-executing, it is not in conflict with a provision of the statute which is self-executing. * * * A judgment declaring and enforcing a forfeiture does nothing more than work a forfeiture, and when a breach of condition works a forfeiture, there is no office for a judgment to perform, except, perhaps, to supply conclusive evidence of the fact—evidence which may in certain contingencies be useful, though not for all purposes essential. * * * It follows from this conclusion that the plaintiff, having forfeited its right to use or occupy the street which it had left vacant for four years after the expiration of the time limited for the completion of its road, had no more right to lay its track there than one who had never been granted a right of way, and the city was clearly within its right in preventing the trespass. * * * The plaintiff was not in possession. It was attempting unlawfully to take possession, and the city was merely resisting an unlawful entry upon a street which its duty to the public required it to keep clear of unauthorized obstructions."

The duty of the company to perform its franchise and the penalty of forfeiture for defaulting in its duty is clearly defined in the case of *State v. Birmingham Water Works Co.*, 185 Ala. 388, 64 So. 23, Ann. Cas. 1916B, 166: "To say that the powers may be retained as against the state, stripped of the obligations to secure which alone the powers were granted, is to misconceive the fundamental principles of public and private right. The mission of all public service corporations is ministry, not mastery; and wilful defiance of duty merits the stigma of outlawry and the penalty of forfeiture or dissolution. Every principle of law and public policy points directly to this conclusion—and with special force where the service relates to the

supply of a great commodity without which people can not exist, and under conditions of practically perfect monopoly. Certainly no corporation worthy to live will ever suffer from such a rule."

Where a failure to perform its franchise contract is expressly made the condition of its forfeiture this effect follows such a failure automatically for as the court said in the case of *Gas & Electric Securities Co. v. Manhattan & Queens Traction Corp.*, 266 Fed. 625⁵: "In granting a franchise to occupy the streets, the board is acting in a purely governmental capacity. It certainly can not be said to be acting in any private or proprietary capacity. In passing the resolution declaring the grant at an end, it equally acts in a governmental capacity, as the agent of the state, and for the promotion of the public good. *Edson v. Olathe*, 81 Kans. 328, 331, 105 Pac. 521, 36 L. R. A. (N. S.) 861. The general rule is that a court of equity will not issue an injunction to restrain a municipal corporation from the exercise of legislative or governmental power, even though the contemplated action may be in disregard of constitutional restraints and may impair the obligation of a contract. *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. ed. 518; *Dillon's Municipal Corporation* (5th ed.), volume 2, section 582; *McQuillin's Municipal Corporation*, volume 5, section 2503, and volume 1, section 715. * * * The granting of a franchise is not a judicial, and under our system not an executive, act. If it is not legislative, we do not know how its action is to be classified. It is certainly acting in a governmental capacity. To say that a state or a city does not legislate when it grants a franchise, because acceptance by the incorporators is necessary, is a proposition we are not prepared to adopt. * * * In the case now before the court the franchise contract expressly provided that, if the company did not complete the construction and place in operation the railway on or before the dates specified, 'the right herein granted shall cease and determine.' We are satisfied the company did not comply with its contract. It did not construct and put in operation its railway within the time allowed it for the purpose, and because it did not do so its franchise automatically ceased and determined."

That a failure to perform terminates the franchise rights is clearly decided in the case of *Wheeling v. Chesapeake & Potomac Tel. Co.*, 82 W. Va. 208, 95 S. E. 653, P. U. R. 1918F, 408: "Failure of the Consolidated Telephone Company to discharge any

⁵ Appeal dismissed in 262 U. S. 196, 67 L. ed. 946, 43 Sup. Ct. 513.

of the duties it assumed and to exercise any of the rights conferred upon it, after the sale and conveyance of its property as aforesaid, specifically alleged in the bill, terminated its franchise and gave the city the right to have the termination thereof judicially declared. * * * If the acquired franchise authorizes maintenance of only one system, the holder thereof can not operate two, and thus subject the streets to a double burden for its purposes. * * * Two separate systems take twice the space on the street required for one. Moreover, the expense incident to the maintenance and operation of two systems by one company, if authorized, might necessitate higher rates for service. All expenses rightfully incurred enter into the matter of rates, for the company is entitled to charge enough to cover proper expenses and reasonable compensation for the use of its invested capital."

Where the language of the franchise indicates that performance according to its terms and within the time prescribed is a condition precedent, a failure to perform within the time fixed by the franchise constitutes per se a forfeiture of any franchise rights, so that no municipal act revoking the franchise is necessary. This principle is clearly established and well expressed as follows in the case of *Security Trust Co. v. Grosse Pointe*, Michigan, 32 Fed. (2d) 706: "It will be noted that the village franchise of 1891 was terminated by the agreement of 1893, * * * and that the village franchise of 1893, as supplemented in 1895, has expired according to its terms. * * * Indeed no claim is made to the contrary. Whatever rights, therefore, plaintiff has in the premises, must be based upon one of the township franchises in question. Considering first the township franchise of April 8, 1891, it is clear that, as this franchise was granted by the township after the present defendant village, by its incorporation as a municipality in 1889, had acquired control, independent of said township, over the public highways, including the route here involved, within the territory of such village, such franchise conferred no rights upon the grantees therein or their successors in title, as against the defendants herein. * * * The contention of the defendants that this franchise is void, because a township has no authority to grant a perpetual franchise to a street car company, the maximum life of which is by law limited to thirty years, is, even if applicable to this grant originally made to individuals, clearly without merit, and was decided adversely to such a contention by the United States Supreme Court in the case of *Detroit v. Detroit Citizens Street Railway Co.*, 184 U. S.

368, 22 Sup. Ct. 410, 46 L. ed. 592, in which the court, speaking of a similar argument there advanced by a street car company, said * * * 'A corporation whose corporate existence was limited to a term of years could always purchase the fee in property which it needed for the operation of its business. If at the end of its term its life were not extended, the property which it owned was an asset payable to the shareholders after the payment of its debts, and in a case like the present, where the consent was assignable and transferable, * * * any company itself having corporate existence for that purpose, could purchase the outstanding term and operate its road thereunder. We see no reason why the company could not take the extended term as provided for in the ordinance, and it formed a good consideration for the agreement on the part of the company to perform the other obligations contained in the ordinance.' The same conclusion was reached and expressed by the circuit court of appeals for the sixth circuit in *Detroit Citizens Street Railway Co. v. Detroit*, 64 Fed. 628, 26 L. R. A. 667. * * * Regardless, however, of the rule just mentioned, it is, in my opinion, manifest, from an examination of this franchise, that the language just quoted therefrom was intended, and therefore must be held, to be a condition precedent, on the performance of which, according to its terms, depended the right of the grantees and their assigns to enjoy the use of the public highway thus conditionally granted. *Township of Hamtramck v. Rapid Railway Co.*, 122 Mich. 472, 81 N. W. 337. As already indicated, I am satisfied by the record, and find, that the building of this road was not commenced nor completed within the periods thus prescribed for such commencement and completion, respectively. It follows necessarily that the condition thus agreed on between the parties to this franchise was not performed and complied with as required by its express terms. * * * Revocation may, of course, be implied as well as express, and if it should be thought necessary that said township should have expressed its intention to revoke this franchise for failure of the grantees to observe this condition thereof, such an intention to exercise its right to terminate said franchise was plainly evinced by its granting of this later franchise. * * * It is earnestly insisted by the defendants that the acts of the plaintiff's predecessors in seeking, obtaining, and using the franchises granted by the defendant village, after the time at which the plaintiff now claims that such predecessors already possessed a franchise granted by the township conveying the same rights, shows an abandonment, waiver, or nonuser of the rights so

claimed to have been received from the township. There is considerable force in this argument. That such rights may be so lost can not be doubted. *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 35 Sup. Ct. 72, 59 L. ed. 184. Moreover, the acquisition of these later grants from the village appears to indicate, under the circumstances disclosed by the record, an understanding and admission on the part of such grantees to the effect that their rights under the original township franchise had been terminated by the failure to perform its conditions."

§ 470. **Forfeiture or expiration of franchise waived—Estoppel.**—Where, however, the municipality for a number of years acquiesced in the default of the municipal public utility, which if taken advantage of at the time could have been declared a forfeiture of its franchise rights, the municipality is not entitled to a decree of forfeiture after there has been a substantial, although tardy, compliance with the provisions of the franchise. After the franchise provisions have been substantially complied with and a large investment made for the purpose of carrying out the obligations imposed by the franchise, the municipality can not then secure a forfeiture of the franchise rights, for as the Supreme Court of West Virginia in the case of *Wheeling &c. R. Co. v. Triadelphia*, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 321, decided in 1905, said: "Having thus determined that there was, on the face of the contract, cause for forfeiture, it remains to be determined whether such steps were taken by the council as to work, in law, a forfeiture. * * * In August, 1901, after four or five years of acquiescence, the council took steps to forfeit by service of notice. Then before the expiration of the time allowed there was a partial compliance with the requirements of the notice—a substantial compliance with its requirements. In view of the long acquiescence of the authorities of the town, the railway company may well have supposed, and no doubt did suppose, that no action to forfeit the franchise would be taken under these circumstances. * * * Willingness and desire to comply strictly with all its covenants is plainly expressed by the railway company in its bill, and was verbally communicated to the town authorities immediately after the forfeiture was declared, when the ink on the repealing ordinance was hardly dry. As to the ability of the company to make full compliance, there is no question. Under these circumstances, is it equitable and just to the company, or promotive of the public interests, to destroy this railway? It represents an investment

of thousands of dollars and affords means of convenient and rapid travel and transportation for the people of the town and the general public. Why so great a punishment for such slight cause? It is unprecedented so far as the authorities examined disclose. If the injury could not be remedied, or the railway company stood defiant, refusing to perform, the case would wear a different aspect; but it does not. It is willing to perform to the letter—to pay the last farthing.”

Acquiescence by the city and operation by the municipal public utility after the expiration of the franchise creates rights that are well defined by the court in the case of *Henry L. Doherty & Co. v. Toledo R. & Light Co.*, 254 Fed. 597: “Although the Toledo Railways & Light Company has been operating in Toledo for more than four years without a franchise, it nevertheless has the right to make a reasonable use of the streets in the proper conduct of its business, until it is forbidden to continue by positive action of the city authorities, who may impose, as an alternative to ejection, reasonable conditions of use. *City of Detroit v. Detroit United Railway*, 172 Mich. 136, 137 N. W. 645. It is therefore no trespasser, for the city authorities have not hitherto acted, either to eject it or to impose reasonable conditions of use. Because there is no contractual relation between it and the city of Toledo (that is, it has no franchise), the power of the city over it is limited to the pursuit of one of the two alternatives above suggested, namely, to order the company off the streets, or to prescribe terms of use which meet the law.

* * * When a public utility corporation is operating without a franchise, and, consequently, is not bound by any contract stipulation therefor, which is the case here, it has the right to demand for its service from time to time a rate of fare which will secure to it reimbursement for its expenditures properly incurred in rendering the service, plus a fair return upon the valuation of the plant actually employed in performing the service.

* * * The court can do nothing more than to refuse any relief to the street railroad company if the council tells it to get off the street. It can do nothing less than to tell the city that it must allow to be collected a compensation for service which meets the conditions above established, so long as it permits the railroad to operate at all. There is no third course which the court can take, unless the parties agree. * * * The company, not being controlled by franchise limitations, was not obliged to consult the city in fixing fare. As a matter of courtesy, or

expediency, or both, it did invoke the city's cooperation, only to meet an ultimatum from the mayor which amounted to a threat."

Forfeitures are not favored, and where the municipality declined to forfeit franchise rights for the nonperformance of a condition subsequent, the court may well refuse to do so, as was indicated in *Fort Worth Gas Co. v. Latex Oil &c. Co.* (Tex. Civ. App.), 299 S. W. 705, for as the court said: "The distribution of natural gas to the citizens of Fort Worth manifestly contributes largely to their convenience and comfort. Forfeitures are not favored by the law, and the governing body of the city has evidently not only failed, but declined, to declare a forfeiture of any right conferred by ordinances upon either the association or corporations, and we decline to do so. The provision of paying three per cent gross earning tax is clearly a condition subsequent, and it seems to be settled by the law that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor, if the grant proceeds from an artificial person, and, if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. * * * The charter of the Magnolia Petroleum Company and article 1497, * * * in terms clearly confers the right upon the appellee company to lay its pipe lines along and under any street or alley of the city under the direction of the governing body."

This principle defining the franchise rights of public utilities is applied to similar rights under a lease, in which the parties were attempting to fix a fair rental from the data secured during an experimental period, the length of which was not definitely fixed. This application of the principle and the attitude of the court in excluding the opinion and report of an expert concerning the facts determined by the experience, disclosed by the trial period of the lease, are established and discussed as follows in *Wilson v. Public Service Comm.* (Pa. Super. Ct.), 157 Atl. 497: "It is argued that the occupancy and operation of the subway by the company during this period was illegal, and that its entire receipts, regardless of its operating expenses, should therefore be paid into the city treasury. In our opinion, there is no merit in this contention; the company was not a trespasser; it entered as a tenant of the city under the lease of 1928, and its entire occupancy has been that of a tenant; all the owners of the subway are entitled to receive for the use of their property during the experimental period is a fair rental. * * * Appel-

lants have printed the Maltbie report; it is an interesting disposition upon factors which, in the opinion of its author, should be taken into account in framing a lease. There is no definite suggestion that the figures in table B are not correct so far as they go. * * * The writer propounds, and states his answer, to these somewhat academic inquiries. * * * The report covers only eleven out of the twenty-two months in question, and Dr. Maltbie's conclusion was that the 'operating results' for these eleven months 'are of limited value in determining the terms of an agreement for the operation of the subway for any considerable period.' After an examination of the offer, we can not say the commission erred in excluding it from the record as immaterial to the issues before it."

Acquiescence in the continued use of the streets after the termination of the franchise or the abandonment of service fails to take the place of a franchise and is not sufficient to grant a continued right of occupation of the streets, which can only be had by the granting of another franchise with the consent and approval of the public service commission, if this is required in the particular jurisdiction, as is clearly indicated and established in the case of *People v. Public Utilities Comm.*, 255 N. Y. 232, 174 N. E. 637, P. U. R. 1931B, 168, where the court spoke as follows: "The wrong charged in the complaint was the continued occupation of the streets after the time limit had expired. The justification pleaded in the answer was acquiescence and estoppel. * * * At that time (November, 1928), the public service commission had not yet issued a certificate of permission and approval. Plainly, therefore, the Smith franchise, apart from any objection of nonacceptance or nonuser, could not avail to confer upon the defendants a present right of occupation. * * * The meaning is no more than this, that the franchise to the power company, the only franchise mentioned in the decision, has been terminated through lapse of time, and that the acts relied upon by the defendants in support of their defenses of acquiescence and estoppel are unavailing to preserve it. * * * The revocation, if lawful, puts the consent out of existence as effectively as if a franchise for a definite term had expired by limitation. A prop essential to approval is withdrawn, and the petition collapses with it. We think a lawful revocation, terminating the franchise, has been established by the village. The rule is now settled that the municipal authorities consenting to a franchise for the occupation of the public streets may revoke the consent for nonuser of the privilege. * * * Sufficient

grounds there plainly were for the recall of this consent. * * * The evidence of abandonment could hardly have been clearer if the petitioner had come forward after inaction for a century."

The property value of a waterworks plant after the expiration of its fixed franchise period and while continuing its service for a number of years thereafter by mutual agreement or acquiescence is clearly defined as the value of a plant in operation with the capacity and right to continue its service in the leading case of *Denver, Colorado v. Denver Union Water Co.*, 246 U. S. 178, 62 L. ed. 649, 38 Sup. Ct. 278, as follows: "The alternative, which we adopt, is to construe the ordinance as the grant of a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver. It recognizes the dependence of the city upon this plant, by necessary implication confers upon the company whatever privileges may be necessary to enable it to continue serving the public, in effect requires it to furnish water, and in terms prohibits it from exceeding the specified rates. In this situation there can be no question of the company's right to adequate compensation for the use of its property employed, and necessarily employed, in the public service; nor can it be doubted that the property must be valued as property in use. It involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its 'junk value.' Nor is the question of value for present purposes greatly affected, if at all, by the fact that there is neither right nor obligation to continue the use perpetually, or for any long period that may be defined in advance."

To the same effect the United States Supreme Court reiterated its position on this principle, which is generally accepted as expressing both the law and the reason on the subject, in the case of *Detroit United R. Co. v. Detroit, Michigan*, 248 U. S. 429, 63 L. ed. 341, 39 Sup. Ct. 151, as follows: "There can be no question that it was within the city's power to compel the company as to its nonfranchise lines to remove its track from the streets of the city. This was settled in *Detroit United R. Co. v. Detroit*, 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. 697. The city did not do so. Instead of taking such action it passed the ordinance in controversy, providing for the continued operation of the company's system. This ordinance has application to the entire

street railway system. * * * It is clear that the city might have taken a different course by requiring the company to remove its tracks from the nonfranchise lines; it elected to require continual maintenance of the public service; doubtless because it was believed that it was necessary, in the existing conditions in the city, to continue for a time, at least, the right of the railway company to operate its lines. This amounted to a grant to the company for further operation of the system, during the life of the ordinance. For this public service it was entitled to a fair return upon its investment."

To a similar effect the continuing right of the parties is defined in the case of *Toledo, Ohio v. Toledo Railways & Light Co.*, 259 Fed. 450, as follows: "By the line of decisions of the Supreme Court, culminating in the *Denver Water Co.* case, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. ed. 649, and the *Detroit Railway Co.* case, 248 U. S. 429, 39 Sup. Ct. 151, 63 L. ed. 341, it is now clearly settled that when the franchise rights of a public service corporation to use the streets of a city expire, the city has the absolute right to order the discontinuance of the service and the removal of the property from the streets; that the company has a corresponding right to make such discontinuance and removal; but that if neither party exercises this right, and if the company, at the city's request, continues to occupy the streets and to give service, the public regulatory power can be exercised only subject to the condition that it must not bring about confiscation. * * * It is clear to us that, without embarrassment from this order, the city council may proceed at any time, and from time to time, to fix what it regards as reasonable rates of fare, and that these must be observed by the company unless it shall be decided by competent judicial authority, provisionally or finally and according to established practice, that they will operate with confiscatory effect."

That the city is estopped by its agreement independently of the franchise and even after its expiration to insist on a forfeiture is decided in the case of *Eau Claire Dells Improvement Co. v. Eau Claire*, 172 Wis. 240, 179 N. W. 2: "The estoppel invoked is against the contract provision, and not against the legislative franchise. The gravamen of plaintiffs' case is to restrain the city from enforcing the forfeiture clause of the contract because of its conduct. And the sole question now for decision is: Has the city estopped itself from enforcing the forfeiture feature of its contract? As to that it is immaterial * * * that some one else may have a right to complain.

* * * Upon the former appeal (134 Wis. 548, 115 N. W. 155), it was decided that the assertion of the forfeiture rested upon contractual rights between the parties. Bearing this in mind, and bearing in mind that the contractual rights spring from a proprietary, and not from a governmental, exercise of municipal power, it follows that estoppel can be urged against the city upon the same grounds and sustained by the same proof that is essential against a private person. * * * In view of the fact that the uses complained of have not affected the navigability of the river for such purposes as it is practically navigable; that they have not injured the city or third parties; that the city from the very inception of the completion of the dam until a short time before this action was begun, not only silently permitted the uses complained of, but actively encouraged them; that in reliance upon such permission and encouragement by the city, plaintiffs have in good faith spent hundreds of thousands of dollars in improvements that would inure to the benefit of the city if it could insist upon the forfeiture, it is deemed that the trial court reached the correct conclusion when it restrained the city from now enforcing the forfeiture."

§ 471. Provisions of municipal franchise modified by agreement.—That a part of the service which a municipal public utility is rendering may be abandoned and the street in which such service is discontinued vacated by it with the consent of the municipality follows from the fact that the parties who entered into the franchise agreement may modify its terms by mutual agreement without the consent of the state, for the reason that the franchise grant to be modified is the special privilege of using the streets of the municipality and is not concerned with the general franchise rights granted by the state permitting it to exist as a corporation. This generally accepted rule together with the distinction between the special franchise rights granted by the municipality and the general franchise rights granted by the state is well expressed in the case of *Thompson v. Schenectady R. Co.*, 124 Fed. 274, decided in 1903, where the court upheld the right of the defendant company to abandon its service and remove its equipment on a certain street. In the course of its decision to this effect, the court said: "The point that the right to run over a portion of Washington avenue could not be abandoned without the consent of the state is not well taken. Counsel have fallen into error as to the meaning of the word 'franchise.' It may be true that a corporation can not

abandon its franchise—can not commit suicide—without the consent of its creator, the state. But 'franchise,' i. e., the right to exist and perform certain acts, is a thing distinct from the property rights which the corporation when created may acquire from individuals. * * * In this case the property owners who granted rights of way by consents which were subsequently mutually abandoned are seeking to have such abandonment adhered to. The 'franchise,' the charter granted by the state is one thing; the property rights, including rights of way which the chartered body may acquire from private individuals, is quite another. These latter may be lost by acts of the corporation, and the approval of the state is not necessary."

§ 471a. **Determination of title to property placed in streets.**—A city by ordinance can not delegate to an administrative office the right to determine title to property, placed in its streets with its consent, because the legislative department of a municipality can not delegate or impose any judicial power upon an administrative officer, and any attempt to do so will be restrained by a court of equity, for as the court said in the case of *Pacific Tel. & T. Co. v. Seattle*, Washington, 14 Fed. (2d) 877: "The court judicially knows that the defendant city may not engage in the business of telephone service. * * * If the superintendent of public utilities of the defendant found that the plaintiff 'has so commingled and confused the franchise property in the streets that it is impossible to segregate from the balance of the property poles, wires, and conduits placed in the streets by the predecessors in interest of said company, while owning the franchises granted by said Ordinance No. 6498, as amended, * * *' etc., then 'he is hereby authorized and directed to take possession of all poles, wires, conduits of such company, placed in the streets on or prior to January 21, 1926. * * *' The city by this ordinance delegated to the superintendent of public utilities the power to adjudicate title to property erected under different ordinances, by adjudicating a fact with relation to confusion. This is a power which the city can not delegate. * * * By the same token, the defendant city, through its legislative body, may not delegate or impose judicial power to or upon its superintendent of public utilities. The plaintiff in its complaint charged that the defendant superintendent will execute such order unless restrained, and the presumption is that he will follow directions; the direction in the ordinance is a step indicating a purpose to interrupt the continuity of the plaintiff's telephone service, and, as said by the Supreme Court in *Boise Artesian*

Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. ed. 796, it is clear reason for the interposition of a court of equity, 'for if that were done illegally or unconstitutionally an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined.' See, also, Terrace v. Thompson, 263 U. S. 197, 44 Sup. Ct. 15, 68 L. ed. 255; Fredenberg v. Whitney (D. C.), 240 Fed. 819."

§ 472. **Title to property not affected by expiration of franchise.**—For the purpose of determining the nature of the property rights and the manner of their exercise belonging to the municipal public utility at the termination of the franchise period the case of Cleveland Electric R. Co. v. Cleveland, Ohio, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. 202, decided in 1907, is in point for the court restrained the city of Cleveland from permitting another corporation by ordinance from taking over the property of the plaintiff and operating it from the expiration of the franchise period upon the payment of an amount to be agreed upon or fixed by the court. In the course of its opinion by way of defining the rights of the plaintiff company, the court said: "The defendant insists that, upon the termination of the grant to the Garden Street branch, the rails, poles, and other appliances for operating that road, and then remaining on the various streets, became the property of the city or at least that the city had the right to take possession of the streets and of the rails, tracks, etc., therein existing. We agree with the court below in the opinion that the title to the property remains in the railroad company which had been operating the road, and we are of opinion that the Forest City Railway Company had no rights in the streets, so far as to affect the right of the complainant to its property then existing in such streets."

The purchaser of public utility property after default on the part of the original owner may take it independently of the franchise as is clearly indicated in the case of Winfield, Kansas v. Wichita Natural Gas Co., 267 Fed. 47, P. U. R. 1921C, 353: "In considering these transactions, the fact must be constantly remembered that the Wichita Company owed no duty to supply gas to the city or its inhabitants, and that it had no contract with the city or its inhabitants to assume any obligation to them to furnish gas, and that there is no fraud or deception alleged in any of these transactions. It had the right to refuse to assume, and to prevent assumption, of the obligations of its insolvent debtor to the

city, and this is what it did; and it did it in the ordinary, natural, and normal way by organizing a corporation that made that assumption, and thereby prevented its stockholder, the Wichita Company, from so doing. * * * It is not denied that one may purchase the property and franchise of a public utility corporation, and so use it or refuse to use it as to make himself liable for the obligations of the former holder to operate it."

§ 473. **Right to retake property necessary to enjoy its ownership.**—An excellent statement of the property rights as well as the relation existing between the parties on the expiration of the franchise period is furnished by the case of *Laighton v. Carthage*, Missouri, 175 Fed. 145, decided in 1909, where the court recognized the necessity of permitting the municipal public utility to go upon the streets and make such excavations as were necessary to remove its property. While this right of removal is necessary to the proper enjoyment of its property rights, its exercise is necessarily attended with much difficulty and expense on account of which it is generally avoided by a sale of the entire municipal public utility system to the municipality or another corporation or by a renewal of the franchise between the original parties to it. In the course of its decision defining the property rights and the relation existing at the expiration of the franchise, the court, in following the case of *Cleveland Electric R. Co. v. Cleveland*, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. 202, said: "When the franchise contract between the water company and the city expired by limitation, the right of the company to operate its plant and use the streets of the city therefor ceased, and with it the right of the city to demand the service. The relation between them was contractual, so that when the contract ended either was at liberty to go its way. Neither could compel the other against its consent to do business with it. By consent the company continued to furnish water supply, and the city continued to take it as theretofore. The law is well settled that, under such tacit arrangement, while so acting the water company was rendering a service to the public, and, therefore during such service it became subject and amenable to the obligations growing out of such assumed quasi-public service, to the extent that it was required to supply water adequate, to its reasonable capacity, and at reasonable rates, and to this extent became subject to the jurisdiction and supervision of the courts to enforce such implied undertaking. * * * The right of the complainant at the termination of the contract to enter upon the streets of the city to remove its plant, without

let or hindrance, does not admit of debate.⁶ * * * The right to enter upon the streets of the city for the purpose of excavating and removing the water plant, pipes, hydrants, and other equipment inheres in the very right of ownership of the property, as otherwise, the right of ownership could not be exerted."

A further decision as to the rights of the parties on the expiration of the franchise which the court held terminated their contractual relation and the special privilege of the municipal public utility to the use of the streets with the result that the defendant became a trespasser is furnished in the case of *Detroit v. Detroit United Ry.*, 172 Mich. 136, 137 N. W. 645,⁷ decided October 1, 1912, where the court said: "From this determination it does not follow that any rights of ownership in and to its property in the public streets used in the maintenance and operation of its railway are taken from it. On the contrary, it is the settled law that, after the expiration of a franchise of a street railway company, such property belongs to it. *Cleveland v. Cleveland Electric R. Co.*, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. 202, *supra*. Such ownership necessarily carries with it the right of removal, and no arbitrary power is given to the complainant or should be given to it to proceed at once by force to effect such removal. Defendant is entitled to and should be given notice to remove its property within a reasonable time."

Where no period is fixed for the operation of the franchise it may be abandoned for loss in its operation and the property removed, as the court said in the case of *Potter Matlock Trust Co. v. Warren County*, 182 Ky. 840, 207 S. W. 709: "Returning now to what we conceive to be the principal question in the case, our opinion is that when it has been clearly demonstrated that a street railway company, that has secured the privilege as this company, or its predecessor did to construct and operate a line of road, can not continue its operation as a whole under good business management except at a loss, the company may be permitted to remove all its tracks and equipment and abandon the road upon restoring the highways it occupied, in so far as they were occupied by its tracks and other equipment, to the condition of the remainder of the adjacent highways at the time the abandonment took place. But in announcing this principle we wish to be distinctly understood that its applicability is to be confined to a state or case similar to that presented by the rec-

⁶ *Cleveland Elec. R. Co. v. Cleveland*, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. 202.

⁷ Affirmed in 229 U. S. 39, 57 L. ed. 1056, 33 Sup. Ct. 697.

ord. We do not mean to go so far as to say that, where there was a contract obligation upon the part of the company to operate its road for a specified time, it might, upon a showing that the road could not be operated even under efficient management except at a loss, abandon the operation of the road before the term stipulated in the contract had expired. * * * Accordingly, we think that a further test of the question whether this road can be operated at a reasonable profit should be made before the company should be permitted to abandon it."

§ 474. **Plant should not be dismantled but transferred.**—The large investment necessary to the installation of the ordinary public utility plant should be conserved in the interest of the public and not destroyed at the expiration of the franchise period, for otherwise the public is required to pay not only the value of the service rendered, but is also obliged to pay the value of the plant itself, for its removal at the expiration of the franchise results in the great waste due to the inevitable depreciation attending thereon. Therefore, unless the plant is disposed of as installed and as a going concern, the expense attendant upon its actual physical removal is necessarily borne by the patrons of its service to whom it is shifted in fixing the cost of the service. The decision in the case of *Denver, Colorado v. New York Trust Co.*, 187 Fed. 890, decided in 1911, considered this practical phase of the question in determining the property rights of the municipal public utility on the expiration of its franchise and argued in favor of the plant being taken over by the party who is to render the service after the expiration of the franchise, thus avoiding the necessity of removing the equipment and the consequent loss resulting therefrom. In the course of its opinion, the court said: "When a water company assumes the duty of supplying a rapidly growing city and its inhabitants with water for a period of twenty years, necessarily involving the expenditure of large sums of money, it is but natural that some consideration would be given by the parties to the status of the company and its property at the end of the period."

However, the Supreme Court of the United States reversed this case of *Denver v. New York Trust Co.*, in 229 U. S. 123, 57 L. ed. 1101, 33 Sup. Ct. 357, and decided that on the expiration of the twenty-year period of the franchise, all rights to the use of the streets terminated, and that although the municipality might renew the franchise or purchase the plant, it was not obliged to do so, for as the court said: "In the absence of some stipulations to that end the city would be under no obliga-

tion to purchase or to renew, nor would it be entitled to do either. There is no stipulation purporting to impose such an obligation. All that is done is to reserve or give to the city the right to purchase or to renew, if it so elects. In other words, it is given a privilege to do either, but with no obligation to exercise it. * * * The water company, although the undoubted owner of the physical property constituting its plant, is without a franchise to maintain and operate it through the streets of the city, the prior franchise having expired; and the city not only is under no legal obligation to renew the franchise or to purchase the plant, but is free to construct and operate a plant of its own."

§ 475. **Franchise renewed or plant purchased by municipality.**—That the property of the municipal public utility does not in any sense belong to the municipality on the expiration of the franchise period is decided in the case of *National Water Works Co. v. Kansas City, Missouri*, 62 Fed. 853, 27 L. R. A. 827, decided in 1894, where the franchise provided for the purchase of the plant at the expiration of the franchise period in case the grant was not renewed. In holding that as the grant had not been renewed at the expiration of the period fixed in the ordinance and that in this event the city according to the terms of the franchise was obliged to purchase the plant at its present "fair and equitable value," the court said: "We dissent in toto from the claim of the city that at the lapse of the twenty years the title to this property, with the right of possession, passed absolutely to it, without any payment or tender of payment, leaving only to the company the right to secure compensation by agreement or litigation, as best it could. * * * Now, the familiar and ordinary law of business transactions is that he who parts with the title receives, at the time, payment. In other words, payment of price and transfer of property are contemporaneous and concurrent acts. When it is affirmed that a contract made by a municipality contemplates that he whose money builds and constructs, and therefore establishes title to, property, shall surrender his title and possession without payment, or even the amount thereof determined, the language compelling such a construction must be clear and imperative. There is no such language in either the act or the ordinance."

§ 476. **Right to remove equipment on forfeiture.**—Where, however, as in the case of *Belleville v. Citizens Horse R. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681, decided in 1894, it

was expressly stipulated in the contract that, if the grantee of the franchise failed to install its plant and furnish its service in accordance with the stipulations in the franchise agreement, the municipality should have the power to revoke the consent it had given for the occupation and use of its streets for the purpose of installing and operating the street railway by the defendant, the default in the performance of the obligations thus assumed by the defendant justified the municipality in repealing the ordinance granting its consent. The passing of such repealing ordinance constituted an election on the part of the municipality to avoid the contract and revoke the grant of the special privilege contained in the franchise which had the effect of terminating the contractual relation between the parties. In sustaining the petition of the city for the right to remove the equipment of the defendant company from the streets of the municipality after such default on the part of the defendant company which the court held had the effect of abrogating its rights to use the streets, and the passage of the repealing ordinance terminating the franchise rights, the court, in defining the rights of the defendant to its property, held that while the equipment belonged to the defendant company, the municipality had the right to require its removal from its streets although it could not forfeit the property in doing so, for as the court said: "Of course, section three of the repealing ordinance was void. The city had no authority without the judgment of a court, to forfeit to its own use the tracks, switches, and turn-outs of the railway company. *Baldwin v. Smith*, 82 Ill. 162. But there was no attempt to enforce it. * * * The case of *Pacific R. Co. v. Leavenworth*, 1 Dill. 393, Fed. Cas. No. 10,649, is very like this. There an ordinance and contract, special in their terms, were construed to give the city a right to reenter and take possession of the street, and remove the railroad track on the failure of the company to comply with the conditions of the ordinance granting to it the right of way. *Dillon J.*, in disposing of the case, said: 'I refuse the instruction, on the ground that the company is in default, and the city is only pursuing a remedy which is given to it by the contract of the parties.'"

§ 477. **Trespasser on expiration regardless of investment in Ohio.**—The Supreme Court of Ohio in the case of *Cincinnati Inclined Plane R. Co. v. Cincinnati*, 52 Ohio St. 609, 44 N. E. 327, decided in 1894, furnishes an extreme decision to the effect that upon the expiration of the franchise period the municipal public utility company on remaining in the streets becomes a tres-

passer whose rights are in no way increased or changed by the fact that it made a large investment in substituting electricity as its motive power. In holding that there was no renewal of the franchise by the making of this additional investment because it was not properly authorized, the court said: "It is a sufficient answer to this claim to say that these expenditures were not authorized by both boards, in whom was vested jurisdiction to make renewals. But, if they had been so authorized, what amount of expenditure should a court hold was necessary to constitute a renewal? And how are we to determine from the amount of expenditures the time for which such renewal was made—for one year, or for twenty-five years? And suppose a street railway had no grant in the beginning; what amount of expenditure would be sufficient to give them an implied grant? * * * The defendant, therefore, during that period of time, was a mere trespasser upon the streets, and did not occupy them by virtue of any contract between it and the city; and it is only by virtue of a contract, express or implied, that it could be made liable for license fees."

It will be noted, however, that in face of the court's holding the municipal public utility to be a trespasser, it provided that the decree enjoining its further use of the streets in the operation of its plant should not be effective until the expiration of a six months' period within which it might apply to the municipality for a new grant permitting it to maintain and operate its plant. This principle, holding the public utility to be a trespasser on the expiration or forfeiture of its franchise is reiterated in the case of *Mt. Vernon v. Berman*, 100 Ohio St. 1, 125 N. E. 116, as follows: "We think there is general concurrence in the view that when a franchise has expired, or has been revoked, the grantee corporation, in the absence of provisions in the contract to the contrary, may be compelled to remove its structures, and on the other hand, if it desires to remove them, can not be prevented from doing so. 19 Ruling Case Law, 1161, section 436; *Laighton v. City of Carthage*, 175 Fed. 145; *Cleveland Electric R. Co. v. Cleveland*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. ed. 399; and *Detroit United Ry. v. City of Detroit*, 229 U. S. 39, 33 Sup. Ct. 697, 57 L. ed. 1056. * * * The company was required by the franchise here in question to do the paving and to keep up the repairs referred to. It wholly failed to perform its contract, and forfeited its franchise. It would be a strange rule which would permit the grantee to violate its contract, to abandon and wholly fail to perform the service to the public for which the

franchise was granted, and then to go upon the street and tear up and render it unfit for travel, without restoration; to tear up expensive paving which it was obligated by its contract to pay for, and which it wholly failed to do."

§ 477a. **Service obligation terminates on franchise's expiration.**—On expiration of a franchise, which is a contract, the right to continue to furnish public utility service, as well as the obligation to do so, terminates, and the utility may withdraw from the field and discontinue service; nor may it be required to remain and render further service, for this would be a constitutional impairment of the property and contract rights of the utility. In practice, the effect of such a situation is obvious and should be avoided if possible by agreement, or better still, by the adoption of a plan for a continuous franchise, which provides uninterrupted service to the consumers and protection to the property rights of the utility. This principle and the effect of its application in practice are indicated in the case of *Union Light, Heat & Power Co. v. Fort Thomas*, 215 Ky. 384, 285 S. W. 228, P. U. R. 1927A, 691, where the court said: "Even without such provisions in the contract, why should a gas company be required against its will to sell its product to the city and its inhabitants after the expiration of its franchise, and after it has fully complied with all the terms and conditions thereof. * * *

A franchise is but a contract between the city and the gas company, binding upon each, and can not be impaired either by legislation or the court. No state shall pass any law, says the Constitution of the United States, impairing the obligation of contract. The writing relied on by the gas company in this case specifically authorized either party to conclude the arrangement at the end of the ten-year period by giving thirty days' notice to the opposite party so that such party might not be taken unaware. After some negotiations looking to the granting of a new franchise, the gas company decided to withdraw from the city, and accordingly gave notice to the city and its inhabitants thirty days before the expiration of the franchise that it would cease to furnish gas after midnight on September 5, 1925. This was in exact accordance with the terms of the contract between the parties. * * * It is not deemed necessary to go into a discussion of the constitutional questions presented, since we have arrived at the conclusion that the franchise contract, and especially section 12 thereof, permitting appellant gas company, upon giving the thirty days' notice specified, to withdraw its service from appellee city in all cases where such gas service was not

voluntarily contracted by the company, makes it unnecessary, for the purpose of this case, to do so."

This same court in a later case recognized the validity of this principle and indicated that on the expiration of the franchise the company only had a reasonable time within which to remove its property from the streets, and on its failure to do so, the city had the right to force its removal; but that if service is rendered after the franchise expires by acquiescence or agreement of the parties, the company is obliged to serve all alike and is entitled to a reasonable rate for doing so. Such continued service, however, would not be obligatory, for the only right to continue to serve and to charge for the service would be by virtue of another franchise issued according to the terms and conditions of the constitution and statutory enactments of the state, as is clearly indicated in the case of Board of Education v. Kentucky Utilities Co., 231 Ky. 484, 21 S. W. (2d) 817, where the court spoke as follows: "The franchise owned by appellee, Kentucky Utilities Company, for the operation of the waterworks system in Somerset, expired September 11, 1925. * * * Conceding without deciding that the allegations were sufficient as to the agreement to carry on the water service after the expiration of the franchise, as appellant contends, it is apparent that such an agreement would have no binding effect whatsoever, as it would clearly contravene sections 163 and 164 of the Constitution. These provide that such rights can be acquired only through the purchase of a franchise as therein described. * * * After the expiration of the franchise the company had only the right to remove its property within a reasonable time. The city might have compelled that removal. This was not done, but the service was continued and accepted. Under the authority of Union Light, Heat & Power Co. v. City of Ft. Thomas, 215 Ky. 384, 285 S. W. 228, so long as the company continued the service it could have been required to render it fairly and without discrimination. It could not have been compelled to supply water service for nothing, but was entitled to reasonable compensation. * * * Hence, the company had the right to cut off the water under the circumstances. Under that condition, on demand, the board paid the accrued water bills in order to have the service continued. The result was a ratification of official action of the unauthorized, but moral, obligation."

On the expiration of the franchise according to its terms, the right to continue rendering service, as well as the obligation to do so, ceased, and the railroad commission of the state had no

power to force a continuance as this would be in violation of constitutional rights. In holding that a public utility under such conditions had the undoubted right to terminate its relations and withdraw its service from the city, the federal court stated this principle and the reasons on which it is based as follows in the case of *Union Light, Heat & Power Co. v. Railroad Comm. of Kentucky*, 17 Fed. (2d) 143, P. U. R. 1927C, 489: "The claim that the orders are violative of section 10 of article 1 of the Constitution of the United States, and of the due process clause of the Fourteenth Amendment to the Constitution, makes out a case properly cognizable in a federal court, and, because of the federal questions raised by the bill, this court has jurisdiction to determine, not only the federal questions involved, but the local questions as well. * * * The franchise involved in this case, by its express terms, ran for a period of ten years from and including September 6, 1915. Therefore, under sections 163 and 164 of the Constitution of Kentucky, as construed by the court of appeals of the state, the plaintiff had no right under that franchise to occupy the streets and public ways of the city of Ft. Thomas after the fifth day of September, 1925, and the city was without power to confer upon it any such right, except in the same way as the original franchise was granted. * * * Therefore, looking alone to the two state constitutional provisions under consideration, it seems perfectly obvious that all obligation on the part of the plaintiff to furnish gas service to the citizens of Ft. Thomas terminated upon the expiration of its franchise, and that any attempt on the part of the Kentucky railroad commission to force a continuation of the service after the expiration of the franchise would be writing into the contract of the plaintiff an obligation which it did not assume, and therefore would be violative of section 10 of article 1 of the Constitution of the United States. Furthermore, to construe section 201e of Kentucky Statutes, relied upon by the defendants as conferring power on the Kentucky railroad commission to force the plaintiff in this case to continue to occupy the streets and public ways of the city of Ft. Thomas and to furnish gas service to its inhabitants after the expiration of its franchise, obtained under sections 163 and 164 of the Kentucky Constitution, would be, in effect, to hold that the general assembly has the right to confer upon the railroad commission of Kentucky the power to set aside the mandatory provisions of these two sections of the constitution. This, of course, the general assembly can not do. These two sections of the constitution took away from the gen-

eral assembly the power to grant local franchises, and expressly vested that power in the municipalities of the state. Such a construction of section 201e of Kentucky Statutes would bring that section in conflict with the constitution of the state. It seems to us, however, that the railroad commission can find no authority under section 201e for its orders in this case. * * * The record discloses that the plaintiff undertook to quit and withdraw from its business as a seller and distributor of gas in the city of Ft. Thomas, upon the expiration of its franchise, but against its will was forced to continue, by a mandatory injunction issued by the Campbell circuit court a few hours before the expiration of the franchise, in a suit filed for that purpose by the city of Ft. Thomas and certain of its inhabitants. * * * The court of appeals of Kentucky reached the conclusion that the plaintiff had the absolute right, under sections 163 and 164 of the state Constitution, to withdraw from the city of Ft. Thomas as a seller and distributor of gas, upon the expiration of its franchise on September 5, 1925, and that to compel it to continue to serve its former customers after that date would impair the obligation of its franchise contract. * * * While this decision of the court of appeals of Kentucky came after the accrual of the rights of the parties in this case, and therefore of itself would not control this court, if we were of a different opinion, yet it is in line with all of the decisions of that court, construing rights accruing under sections 163 and 164 of the state Constitution, and in our judgment announces no new principle of law in Kentucky. * * * However, this record is silent as to any intention on the part of the defendants to abandon their attempt to enforce the orders complained of. So far as we are advised, the suit brought by the defendants to enforce these orders is still alive upon the state court docket, and for this reason, and in view of the conclusions herein announced, the application for the interlocutory injunction is granted."

On the expiration of a franchise, the right of a public utility to occupy the streets and render service terminates, and mere acquiescence on the part of the municipal officials in the continued occupation of the streets gives the public utility no additional right and does not estop the municipality from insisting upon its discontinuing service and the occupation of the streets, as is indicated in the case of *Ohio Electric Power Co. v. State*, 121 Ohio St. 235, 167 N. E. 877, where the court said: "Under the facts presented by the record the claim of the defendant that by reason of the occupancy of the streets of the city of Nor-

walk its predecessor obtained a perpetual right to occupy said streets, to which right this defendant has succeeded, can not be sustained. Under the law as it stood in 1890 when such twenty-year franchise was granted, the partnership could not have acquired such right otherwise than through the municipality itself. * * * That franchise by its own terms expired in 1910, and every right of the predecessor of the defendant to occupy said streets, or any part thereof, ceased on August 31, 1915, under the clear and express terms of its contract above recited, and it could not thereafter convey something which it no longer possessed. * * * Mere acquiescence in the continued unauthorized occupancy of the streets, or nonaction on the part of public officials to prevent obstruction, or delay in bringing action to procure an order of ouster, could not serve to confer any right upon the defendant company or estop the city from maintaining this proceeding."

§ 478. **Impracticable to treat as trespassers on expiration of franchise.**—The leading case on this subject which seems fairly to represent the current authority is that of *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081,^a decided in 1902, in which the duration of the franchise was limited expressly to the period of twenty-five years in accordance with the statutory provision limiting the power of the municipality to grant such a franchise. In the course of its opinion holding that "the money and labor expended in constructing, maintaining, and operating the works must be held to have been expended with reference to the term for which it held a valid grant," the court said: "Neither can there be any such acquiescence or waiver by the city as will prevent or estop it from denying the validity of an act beyond the scope of its municipal powers. A different rule sometimes obtains when the power to contract exists, but has been defectively or irregularly executed; but, if the authority to do the act or make the contract is expressly withheld or denied by law, that fact may always be set up as a defense to an action brought thereon." After deciding that the duration of the franchise was limited to the period expressly stipulated by its terms and could not be prolonged by the acquiescence or waiver of the municipality, the court then proceeded to determine the relation of the parties to each other and the nature of the property rights of the municipal public utility. On

^a Writ of error dismissed in 199 U. S. 600, 50 L. ed. 327, 26 Sup. Ct. 747.

this point the court decided that on the termination of the franchise period the municipal public utility did not become a trespasser, which is a reasonable and practically a necessary limitation on the doctrine of the case of Cincinnati Inclined Plane R. Co. v. Cincinnati, 52 Ohio St. 609, 44 N. E. 327, and said: "It had been engaged in the performance of a work of public utility. That service was of a nature which of necessity, required the occupation of the streets with pipes buried in the soil, with connections therefrom of more or less permanent character to the buildings and premises of patrons. These improvements could not be removed, nor to any extent interfered with, during the term of the franchise, without interrupting the service the plaintiff was bound to render; it must be presumed it was contemplated by the parties that the company should remain in possession such reasonable length of time after the expiration of the term as might be necessary to negotiate an extension or renewal of the franchise, or, in default thereof, to close out its business without unnecessary sacrifice. Moreover, the city, by continued acceptance of the water service, and by assuming to regulate the rates thereof, gives implied consent to the present possession of the streets and operation of the works until such time as it shall by reasonable notice see fit to terminate the plaintiff's tenure of the privilege."

This position extending the mutual rights of the parties to the franchise after its expiration by acquiescence is defined in the case of Louisville, Kentucky v. Louisville Home Tel. Co., 279 Fed. 949: "It is now the settled rule, where a rate fixing public service franchise has expired, and where there is no inconsistent statute, that the city has an optional right to eject the corporation from the streets, but that, so long as the city requires the corporation to continue to give public service, it must allow compensatory rates. * * * Adopting the same view which has been thus approved by the Kentucky courts, we conclude that the city had no lawful right to refuse to comply with section 3037d of the Kentucky statutes and at the same time arbitrarily to exclude the company. It follows that the situation considered by the minority in the Detroit case, 248 U. S. 429, 63 L. ed. 341, 39 Sup. Ct. 151, is not created, and—unless for other reasons to be discussed—the company could not be compelled in May, 1921, to accept confiscatory rates as the price for being allowed to continue its business."

After the expiration of the franchise the rate fixed by it is no longer binding, and while the municipality may treat the public

utility as a trespasser, the parties by mutual agreement, may continue the service and the company may receive a reasonable return for it. Where all parties concerned desire that the service be continued, it will be presumed and the court holds that the company will be entitled to a reasonable rate, for as the court said in the case of *Walker Bros. Catering Co. v. Detroit City Gas Co.*, 230 Mich. 564, 203 N. W. 492: "And it was also agreed in the award that the rates were fixed for three years. It is difficult to see how the rates could be collected for three years without the tenancy of the street continuing for that time. We think the trial judge was right in holding that what was done amounted to a franchise and required the approval of three-fifths of the voters before it would be valid. The question still remains—and it is the pivotal question—has the gas company, under the circumstances shown here, the right to promulgate a rate which will give it a fair and reasonable return. We think it may be said that when the franchise expired the rights of the gas company in the streets terminated, unless by mutual agreement. No one wants the gas company to discontinue operations. The gas company does not desire to discontinue them. No one should desire the company to do business at a loss. The franchise having expired, it would seem to follow that the rate fixed by it was not still binding. See *Pacific Gas & E. Co. v. San Francisco* (D. C.), 211 Fed. at page 205, *Pond on Public Utilities*, section 451."

When a municipality exercises its right to terminate a franchise after a certain time, according to its terms, it may do so arbitrarily and without purchasing the property, unless the obligation of the municipality to purchase the plant is made a condition precedent to its right to terminate the franchise. Having terminated the franchise, the public utility becomes a trespasser and the municipality may compel the removal of its property from the streets, for as the court said in the case of *Sac City v. Iowa Light, Heat & Power Co.*, 203 Iowa 1364, 214 N. W. 571: "In 1918 the city of Sac City, by proper form and procedure granted to the Iowa Light, Heat & Power Company a franchise for a period of twenty years to erect, maintain, and operate an electric light and power plant and distribution system within the corporate limits of Sac City, Iowa, and to use the streets and alleys and public grounds of said city to erect poles, wires, and other devices." In 1924 the city council adopted an ordinance terminating the rights of the company. In passing upon the right to terminate the franchise the court said: "It therefore

may be accepted as a fact that, under the provisions of the franchise, the city has properly terminated all rights of the defendant under said ordinance. * * * The real contention of the defendant is that the city has no right to oust the defendant without first having paid in accordance with the above agreement, and this is the turning point in the controversy between the parties. * * * It is apparent from the [original] ordinance itself that the city is given the unqualified right to terminate this franchise at any time after September 20, 1921. Having this right, it is entitled to exercise it without rime or reason if it so elects. The duty of the city to purchase and pay for the aforesaid improvements is not made a condition precedent to its exercise of the right of terminating the franchise or ousting the defendant. * * * Having legally terminated the franchise of the defendant company, its occupation of the streets and public alleys and public places of said city with its poles and wires was unlawful, and therefore a trespass. That under such circumstances a municipality may maintain an action in equity to compel its removal is also settled by the authorities."

On the expiration of a franchise in some jurisdictions, the public utilities commission must act upon the question of continuing or abandoning service before the company can be forced to vacate and discontinue the use of the streets where it is continuing to perform its service. This rule is statutory in some jurisdictions and would seem to be the most practical solution of the very difficult problem of fixing and determining the rights on the expiration of the franchise in fairness to all parties and for the best interest of the public in particular. This situation furnishes a good illustration of the practical advantages of the indeterminate permit, under which the right to furnish the service continues during proper service under the regulation of the commission. The plan of determining the matter under the statutory rule established in the state of Ohio is discussed and decided as follows in the case of *Lake Shore Electric R. Co. v. State* (Ohio St.), 180 N. E. 540: "The paramount claim of the company, therefore, is that the Miller Act, so-called, precludes the right of plaintiff to compel defendant to vacate Main Street in the city of Bellevue until application therefor has been made to the public utilities commission, and its consent thereto obtained. * * * We have reached the conclusion that, after the expiration of a franchise acquired prior to the enactment of sections 504-2 and 504-3, General Code, to use the streets of a municipality to operate an interurban railroad thereon, the company,

continuing to operate its cars over the tracks in the streets without objection from the municipality, serving the general public of that and other municipalities of the state through which its line passes, can not be compelled to abandon such service, unless the public utilities commission has consented thereto, as provided in sections 504-2 and 504-3, General Code. These sections of the statute, commonly denominated the 'Miller Act,' are a valid exercise of the police power of the state in regulating public utilities. * * * Being of opinion that there is no question of the impairment of the obligation of an existing contract, our conclusion is that there should have been no judgment of ouster without a submission of the matter to the public utilities commission of Ohio, in which jurisdiction of the matter is vested, subject to review by this court. The judgment of the court of appeals is therefore reversed."

§ 479. **Agreement express for revocation and removal.**—Where, however, the franchise expressly stipulates that the municipality shall have the right to revoke the grant of the special privilege and also require the removal of the equipment from its streets under certain conditions expressly made in the franchise, the municipality may exercise such rights and remove such equipment, for as the court in the case of *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495, decided in 1900, said: "The control of streets, as well as of all other public highways, is primarily in the legislature. But the legislature has delegated to municipalities the exclusive control of their streets and alleys. * * * That license [of appellee] contained this provision: 'The said council hereby reserve the right to revoke this grant, and demand that the poles be removed, and remove the same if necessary.' The language is clear and the meaning unmistakable. The grant was a bare license, revocable without cause at the will of the council. If the licensee, at the revocation of the grant, should not remove the poles on demand, the council might cause their removal."

Where the franchise expressly provided for a forfeiture and loss of property for a breach of any franchise condition the city may exercise that power thus expressly given and on forfeiture take the property, as is clearly held in the case of *Tacoma R. & Power Co. v. Tacoma*, 79 Wash. 508, 140 Pac. 565: "The authority to declare the forfeiture is so clearly expressed as to remove the question from the sphere of debate. The ordinance authorized a forfeiture of the franchise for a breach of any of its conditions, and provided for a forfeiture of all poles, lines, wires,

or other property located or constructed in pursuance of the ordinance, 'unless the same are removed within sixty days, and said streets, alleys, and public places from which they are removed put in good condition, and the same shall thereupon become and be the property of said city of Tacoma.' An additional remedy was given to the city to repeal, change, or modify the grant for a breach of its conditions upon thirty days' notice."

Under an express provision of the franchise, title to property may become vested in the city on the forfeiture of the franchise as is clearly indicated in the case of *Puget Sound Traction, Light &c. Co. v. Tacoma*, Washington, 217 Fed. 265: "The remaining and main question in the case is whether complainant acquired title, by its purchase from the Tacoma Railway & Power Company, after decree of forfeiture. The decree of forfeiture was self-executing, both as to the forfeiture of the franchise and the poles and wires in the streets, used thereunder. * * * The reasoning of the foregoing would be apposite, and complainant's position persuasive, if it were not for the fact that, by the decree itself, claimant was, in default of the removal of the poles and wires, not only deprived of all title thereto, but by such default complainant's title vested in the city. This beneficial interest to vest in the city under such default, prevents title being acquired by complainant, other than in the manner expressly left open by the decree and contract ordinance upon which it was based."

§ 480. Municipality must purchase or renew if franchise requires.—The Supreme Court of Alabama, as early as 1875 in the case of *Mobile v. Stein*, 54 Ala. 23, in defining the nature and extent of the property rights of the owner of a municipal public utility on the expiration of its franchise said: "No one can doubt that it belongs to Stein, the appellee, and that the city of Mobile can acquire it only by purchase according to the terms of the agreement and charter. * * * The fact that the grant is for a term of years only, and after that may be terminated by the purchase of the city, does not affect the question under consideration. Most grants of privileges from a political body are for a limited period."

The case of *Wakefield v. Theresa*, 125 App. Div. 38, 109 N. Y. S. 414, decided in 1908, in sustaining an injunction restraining the defendant city from removing or requiring the plaintiff, operating a municipal public utility plant, to remove its wires, poles, and other electrical appliances used by it to furnish electric lighting in the defendant city at the expiration of the original

franchise period for the reason that the municipality desired to install its own plant, and in holding that defendant must either purchase the plant of the plaintiff or renew its franchise as contemplated by the parties in the original grant, said: "In reliance on the contract the plaintiffs and their predecessors in interest expended money in erecting, extending and operating the plant, and the privilege granted to use the streets became a valuable property right of which the owners can not be deprived, unless there has been a forfeiture on their part, or unless the plant has become a nuisance." * * * The contract contemplated the extension of the franchise beyond the five-year period, unless the municipality elected to purchase the appliances. * * * The real animus of the attempt to remove the plaintiffs' plant apparently is to get rid of a competitor to the new municipal lighting system. It may be desirable for the new plant to have all the business of the village, yet the plaintiffs are in the streets by warrant of the village authorities and have been many years operating their plant. The intention of the defendant to destroy their property unless removed within thirty days in order to be justified must be founded upon a manifest disregard of the agreement in important particulars, and the evidence presented does not call for so drastic and summary a remedy."

§ 481. State forfeitures.—Only the state which granted the franchise may have it forfeited for as the court said in the case of *Hatfield v. Peoples Water Co.*, 25 Cal. App. 502, 144 Pac. 300: "It is the general rule that a corporation is responsible only to the sovereignty by whom it was created; and, ordinarily, conduct constituting a cause for the forfeiture of corporate charters and franchises will not ipso facto operate to produce such a forfeiture. Notwithstanding such conduct, 'the corporation continues to exist until the sovereignty which created it shall * * * procure an adjudication of forfeiture, and enforce it.' *People v. Los Angeles Electric R. Co.*, 91 Cal. 338, 340, 27 Pac. 673, 674. In other words, the revocation of corporate charters and franchises is a sovereign right which can be exercised only by the state or in its name. It is clear that supplemental legislation was not required to execute the provision of the constitution providing for a forfeiture of the franchises and works of such water companies as might be guilty of charging or collecting rates in excess of those established by law. The constitutional

9 *People v. O'Brien*, 111 N. Y. 1, R. Co., 157 N. Y. 453, 52 N. E. 545, 18 N. E. 692, 2 L. R. A. 255, 7 Am. 43 L. R. A. 236. St. 684; *Ingersoll v. Nassau Elec. R.*

provision in this behalf is in itself complete and therefore controlling. Moreover, the legislature was neither required nor permitted to enact a law which purported to confer a right in excess of and different from that contemplated by the constitution. It will be seen at a glance that the right to initiate the forfeiture which the legislative enactment in question attempted to confer upon a water rate payer is neither expressly nor impliedly authorized by the provisions of the constitution. And therefore the act to that extent is in conflict with the constitution and to the same extent void."

When the franchise had been granted by the state and the owner had not wilfully refused to provide service, but only discontinued to save a loss on its investment, the court refused the city the right to work a forfeiture; and for the further reason that its action indicated its purpose was to aid a competitor. In the course of its opinion the court in *Fredonia v. Fredonia Natural Gas Light Co.*, 87 Misc. 592, 149 N. Y. S. 964,¹⁰ said: "Plaintiff has no standing in court to maintain an action to forfeit or to declare forfeited the general rights of the defendant company to transact business or to enforce merely private rights. The franchise to do business sprang from the state, and the extinction of that franchise from nonuser should be determined only in a litigation between the people of the state of New York and the defendant. It does not appear that any serious or permanent interference with the public use of the village streets is threatened. Private persons, if threatened with injury, have their own remedy. *New York v. Bryan*, 196 N. Y. 158, 89 N. E. 467. The sole question is whether the plaintiff has established forfeiture by nonuser of the special franchise which it granted to defendant's predecessor to lay pipes in the streets. The pipes are still there, and, should the village or its citizens furnish a profitable market for defendant's gas, it could supply them. The only reason why it has no customers is that in the spring of 1911 it could not afford to supply them on account of competition and therefore temporarily suspended business. Its conduct has not been wilful and without justification, nor has the public suffered therefrom. It is not every nonuser that will furnish grounds for a forfeiture. To work a forfeiture there should be something wrong, and not only a wrong, but one arising from wilful abuse or improper neglect—such neglect as indicates an indifference to the demands of public duty. *People v. B. & R.*

¹⁰ Affirmed in 169 App. Div. 690,
155 N. Y. S. 212.

Turnpike Co., 23 Wend. 236; *People v. Atlantic Ave. R. R. Co.*, 125 N. Y. 513, 26 N. E. 622. Forfeiture is a punishment for fault, not for misfortune. But I fail to see wherein the defendant has failed to exercise its special franchise. Its pipes were laid subject to no conditions as to the delivery of gas, either to the village or to private customers. The franchise contains no condition, express or implied, that the company shall continue to supply gas at a loss. Nor does it appear that any demand has been made upon defendant to furnish gas, since it ceased to manufacture same. The village of Fredonia is not injured by the unused pipes in its streets, nor will it be injured if other streets are opened and pipes laid thereunder to supply customers. The license or permission to lay such pipes remains intact. The village has not even attempted to revoke it, except by bringing this action, which seems to be in the interest of the rival company, rather than the village as such. A competitor should not be thus eliminated unless the law plainly so declares."

CHAPTER 20

STREET AND HIGHWAY PRIVILEGES OF MUNICIPAL PUBLIC UTILITIES

Section	Section
485. Use of street key to regulation.	497. Delegated power may be revoked or modified by state.
486. Streets for use and benefit of public.	498. Streets dedicated in trust for benefit of public.
487. Duty and opportunity of municipal officers to conserve public interest.	499. Title to street in municipality held in trust for public.
488. Control of streets delegated to municipality.	500. Municipal consent condition precedent.
489. Municipal consent to use of streets conditioned on service.	501. No exclusive use unless expressly provided.
490. Power delegated to municipality legislative.	502. No power to alienate or obstruct streets implied.
491. All rights subject to exercise of police power.	503. Telephone and telegraph not limited by local control.
492. Equipment in streets subject to removal or change.	504. Municipal control limited to municipality.
493. Street privileges and police power defined.	505. Power to grant perpetual franchise not implied.
494. Public control of streets and franchises complete.	506. Change of street grade requiring relocation of pipes valid.
495. Municipal control of streets delegated by state.	507. Sewer systems paramount to public utility pipes.
496. Power must be expressly or clearly delegated.	508. Arbitrary exercise of police power not sustained.
	509. Municipality can not barter away right to exercise police power.

§ 485. Use of street key to regulation.—As the occupation and use of the streets and highways is essential in the furnishing of municipal public utility service, the terms and conditions upon which the privilege of such use and occupation are afforded can stipulate and determine the nature, extent and cost of the service to the public. The municipal public utility must have the use of the streets and other highways, which accordingly constitute the key or tangible means by which to regulate and control the service furnished by the municipal public utility, except as this is made subject to the regulation of state commissions created and operating under statutory enactments within the police power.

The most striking example of the importance of street and highway regulation in itself and as the key to regulation and control generally is afforded by motor vehicles operating thereon as common carriers. As the latest and most satisfactory method of local transportation, the motor vehicle is at once the most popular and efficient instrumentality of local transportation. Its use of the streets and highways as places of business for profit, however, is so widespread as to require intelligent and impartial methods of regulation, which will be fully discussed elsewhere.

§ 486. Streets for use and benefit of public.—The control of the streets and highways is in the state in trust for the public for whose use and convenience they are dedicated as a means of transportation and communication, thereby affording to the public the means by which they may go from place to place, communicate with each other and enjoy such other conveniences as the various kinds of service provided by municipal public utilities afford. As the streets and highways are dedicated exclusively for the use and convenience of the public generally, it follows that the legislature acting for the state, or any municipal agency to which this power may have been delegated, should make no grant which will materially interfere with the uses for which the streets and highways are dedicated, and that when they are used as places of profit this use is peculiarly a private business and is subject to the fullest regulation and control.

§ 487. Duty and opportunity of municipal officers to conserve public interest.—The interest of the public is paramount and the duty of the legislature or its duly authorized agent in granting the various special franchise privileges, necessary to the installation and operation of the different municipal public utilities, is primarily to the public. The state or the municipality acting for it has not only the opportunity, but the duty, to make all such grants in the interest of the public and for its benefit and advantage. The fact that the granting of such special franchise privileges becomes a contract on their acceptance by the particular municipal public utility to which they are granted makes it essential that the proper regulation and control of the service to be rendered to the public shall be provided for as a condition of the grant itself. The means of control thus afforded are as adequate as they are convenient of exercise to secure and protect the interests of the public absolutely and for all time. Unless, however, such local control is provided for at the time and as a condition of the granting of the special privilege of using the

streets and highways, the most convenient, if not the only adequate local method of securing such control for the time being at least, is dissipated and the welfare of the public during the life of the grant is thereby practically, if not entirely, lost and destroyed, except as it may be exercised by the state public utility commission.

§ 488. **Control of streets delegated to municipality.**—As the control of all highways, including streets, is exercised primarily by the state through its legislature and only secondarily in part or entirely by municipal corporations, the municipality itself, having been created by the state, has only such power of control over its streets as has been delegated to it as a creature and an agent of the state. The municipality, however, generally has delegated to it very extensive if not practically absolute control over its streets and is accordingly the agency whose duty it is to conserve and protect the interest of the public by proper regulation and control of the use of its streets by municipal public utilities, and especially by motor vehicles operating as common carriers, using them as places and instrumentalities for conducting their private business for profit.

§ 489. **Municipal consent to use of streets conditioned on service.**—The granting to the municipal public utility of the special franchise rights to the use of the streets affords a proper occasion locally for regulating the municipal public utility service to be rendered. Upon the municipality therefore primarily rests the obligation to the public of maintaining the streets for the use of the public in the condition which best serves the interest of the public. The municipal corporation is therefore constituted the trustee of the people generally for this purpose, and whether the title to the street be in the municipality as trustee for the people or in the abutting property owner, in either event the public is the beneficiary and is entitled absolutely to first consideration in the regulation of the use of the street. While the primary use of the street is for the transportation and communication of the public, as has been shown in a former chapter, the rights of the abutting property owner entitle him to compensation whenever the street is subjected to additional servitudes, except when such use relieves the street of travel or is of such public benefit and advantage as to justify an extension of the scope and purpose for which it was dedicated.

§ 490. **Power delegated to municipality legislative.**—The power delegated to the municipality to control and regulate the

use of its streets is legislative and governmental and exceedingly practical in its nature and must not be limited so as to prevent its being used for the best interests of the general public in accordance with the requirements of future conditions. The statutory authority vesting this power of control in the municipality determines the extent to which it may by contract or otherwise authorize a necessary use of the street by the municipal public utility which may to this degree interfere with its use by the public for travel. Any material permanent interference with the uses for which the street is dedicated, however, would be unauthorized and invalid, although expressly granted by the municipality, and in some instances, even by the state itself.

§ 491. All rights subject to exercise of police power.—While the municipality may exercise the power vested in it to attach such conditions and restrictions to its grants of special franchise privileges for the use and benefit of municipal public utilities as seem necessary and for the best interests of the municipality within the statutory authority, neither the municipality nor the state may surrender the control of the streets necessary to the proper exercise of the police power. All franchise rights and special privileges, including vested interests and contract rights which are protected from impairment by the constitution are granted and held subject to the proper exercise of the police power by the state or the municipality in all cases requiring its exercise in the interest of the public health and the general welfare. Indeed, the rule is unquestioned and of general application that the reasonable and necessary exercise of the police power can not be surrendered or abridged by contract at the hands of the municipality or even the state itself. The exercise of this right being a governmental function concerned with the public health, peace, and general welfare can not be alienated or delegated, and all special franchise rights to the use of the streets are subject to the reasonable and necessary exercise of the police power as applied and enforced by statutory enactment or municipal ordinance when authorized by statutory or constitutional provisions.

§ 492. Equipment in streets subject to removal or change.—As one of the chief uses of the streets is for public travel the city in conserving this use for the general public may require municipal public utilities having special franchises to remove their equipment and readjust their appliances whenever this is required by the municipality, making necessary improvements

in a reasonable manner, such as changing the grade of its streets or installing a sewer system, or effecting any other improvement in the interests of the general welfare and the public health. The nature and extent of the police power, however, in its effect and application can only be fixed and defined in a general way except as the particular question is disposed of by the case in which it arises. The municipality, however, in the exercise of this power may not arbitrarily interfere with the property rights of the municipal public utility by unreasonably requiring the absolute removal or relocation of its equipment where the benefit to be derived would not justify the cost and inconvenience of the change in location or the complete removal of the equipment.

§ 493. **Street privileges and police power defined.**—In order to determine the extent of the police power belonging to the municipality and the cases in which its exercise is justified, a number of decisions are considered later on in this discussion. In the first instance, however, the larger and more fundamental question of the control of the streets vested in the state and the municipality respectively, and the manner in which this control may be exercised, and the purposes for which it may be employed in the interest of the public will be illustrated and explained by reference to the decisions concerned with this question in its several aspects.¹

¹ **United States.** *Detroit Citizens St. R. Co. v. Detroit Ry.*, 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. 732; *Detroit v. Detroit Citizens St. R. Co.*, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. 410; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. 471; *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427.

Federal. *National Water Works Co. v. Kansas*, Missouri, 28 Fed. 921; *Grand Rapids Elec. Light & Co. v. Grand Rapids Edison Elec. Light & Co.*, 33 Fed. 659; *Clapp v. Spokane*, Washington, 53 Fed. 515; *Levis v. Newton*, Iowa, 75 Fed. 884, *affd.* in 79 Fed. 715; *Pikes Peak Power Co. v. Colorado Springs*, Colorado, 105 Fed. 1; *Logansport R. Co. v. Logansport*, Indiana, 114 Fed. 688, *appeal dis.* in 192 U. S. 604, 48 L. ed. 584, 24 Sup. Ct. 851; *Morristown, Tennessee v. East Tennessee Tel. Co.*, 115 Fed. 304; *Hoffman v.*

Mitchell, 201 Fed. 506; *Hollis v. Kutz*, 265 Fed. 451, P. U. R. 1920F, 343, *affd.* in 255 U. S. 452, 65 L. ed. 727, 41 Sup. Ct. 371; *Schoenfeld v. Seattle*, Washington, 265 Fed. 726; *Jamestown, New York v. Pennsylvania Gas Co.*, 1 Fed. (2d) 1871; *West Texas Utility Co. v. Spur*, Texas, 38 Fed. (2d) 466.

Alabama. *Birmingham & C. Mines St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615; *Montgomery v. Capital City Water Co.*, 92 Ala. 361, 9 So. 339; *Gadsden v. Mitchell*, 145 Ala. 137, 40 So. 557, 6 L. R. A. (N. S.) 781, 117 Am. St. 20; *Giglio v. Barrett*, 207 Ala. 278, 92 So. 668.

Arkansas. *Little Rock v. Citizens St. R. Co.*, 56 Ark. 28, 19 S. W. 17; *Emerson v. McNeil*, 84 Ark. 552, 106 S. W. 479, 15 L. R. A. (N. S.) 715; *Barnett v. Mays*, 153 Ark. 1, 239 S. W. 379.

California. *South Pasadena v.*

Los Angeles Terminal R. Co., 109 Cal. 315, 41 Pac. 1093; *Ex parte Russell*, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152; *Oro Elec. Corp. v. Railroad Commission*, 169 Cal. 466, 147 Pac. 118, P. U. R. 1915C, 191; *Southern California Edison Co. v. Railroad Commission*, 194 Cal. 757, 230 Pac. 661; *Holmes v. Railroad Commission*, 197 Cal. 627, 242 Pac. 486, P. U. R. 1926C, 664; *Old Homestead Bakery v. Marsh*, 75 Cal. App. 247, 242 Pac. 749.

Colorado. *Greeley Transp. Co. v. People*, 79 Colo. 307, 245 Pac. 720, P. U. R. 1926D, 433.

Connecticut. *State v. Darazzo*, 97 Conn. 728, 118 Atl. 81, P. U. R. 1923A, 133; *Connecticut Co. v. New Haven*, 103 Conn. 197, 130 Atl. 169.

Delaware. *Cutrona v. Wilmington*, 14 Del. Ch. 208, 124 Atl. 658, *affd.* in 14 Del. Ch. 434, 127 Atl. 421.

Florida. *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 10 So. 590; *Anderson v. Fuller*, 51 Fla. 380, 41 So. 684, 6 L. R. A. (N. S.) 1026, 120 Am. St. 170; *Quigg v. State*, 84 Fla. 164, 93 So. 139.

Georgia. *Macon Consol. St. R. Co. v. Macon*, 112 Ga. 782, 38 S. E. 60.

Idaho. *Smallwood v. Jeter*, 42 Idaho 169, 244 Pac. 149.

Illinois. *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; *McWethy v. Aurora Elec. Light & Co.*, 202 Ill. 218, 67 N. E. 9; *People v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245; *Peoria v. Postal Tel.-Cable Co.*, 274 Ill. 568, 113 N. E. 969; *Hoyne v. Chicago & c. Elevated R. Co.*, 294 Ill. 413, 128 N. E. 587; *West Suburban Transp. Co. v. Chicago & c. R. Co.*, 309 Ill. 87, 140 N. E. 56, P. U. R. 1923E, 150; *Edwardsville v. Central Union Tel. Co.*, 309 Ill. 482, 141 N. E. 206; *Edwardsville v. Illinois Bell Tel. Co.*, 310 Ill. 618, 142 N. E. 197, P. U. R. 1924C, 121; *Chicago City R. Co. v. Chicago*, 323 Ill. 246, 154 N. E. 112; *People v. Chicago City R. Co.*, 324 Ill. 618, 155 N. E. 781; *Springfield v. Gillespie*, 335 Ill. 388, 167 N. E. 61.

Indiana. *Eichels v. Evansville St.*

R. Co., 78 Ind. 261, 41 Am. Rep. 561; *Newcastle v. Lake Erie & c. R. Co.*, 155 Ind. 18, 57 N. E. 516; *Coburn v. New Tel. Co.*, 156 Ind. 90, 59 N. E. 324, 52 L. R. A. 671; *State v. Stickelman*, 182 Ind. 102, 105 N. E. 777; *Denny v. Muncie*, 197 Ind. 28, 149 N. E. 639.

Iowa. *Stanley v. Davenport*, 54 Iowa 463, 2 N. W. 1064, 37 Am. Rep. 216; *Des Moines City R. Co. v. Des Moines*, 90 Iowa 770, 58 N. W. 906, 26 L. R. A. 767; *East Boyer Tel. Co. v. Vail*, 166 Iowa 226, 147 N. W. 327; *Des Moines v. Iowa Tel. Co.*, 181 Iowa 1282, 162 N. W. 323; *Ritchhart v. Barton*, 193 Iowa 271, 186 N. W. 851; *Star Transp. Co. v. Mason City*, 195 Iowa 930, 192 N. W. 873; *Cherokee v. Northwestern Bell Tel. Co.*, 199 Iowa 727, 202 N. W. 886; *Ackley v. Central States Elec. Co.*, 204 Iowa 1246, 214 N. W. 879, 54 A. L. R. 474, P. U. R. 1927E, 325; *Des Moines City R. Co. v. Des Moines*, 205 Iowa 495, 216 N. W. 284; *Mapleton, Inc. v. Iowa Light, Heat & c. Co.*, 206 Iowa 9, 216 N. W. 683; *Iowa Ry. & Light Corp. v. Lindsey (Iowa)*, 231 N. W. 461.

Kansas. *Wyandotte v. Corrigan*, 35 Kans. 21, 10 Pac. 99; *Atchison St. R. Co. v. Nave*, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 800; *Western Distributing v. Mulvane*, 116 Kans. 472, 227 Pac. 362.

Kentucky. *Louisville City R. Co. v. Louisville*, 8 Bush (71 Ky.) 415; *East Tennessee Tel. Co. v. Russellville*, 106 Ky. 667, 51 S. W. 308, 21 Ky. L. 305; *Christian-Todd Tel. Co. v. Commonwealth*, 156 Ky. 557, 161 S. W. 543; *Union Light, Heat & c. Co. v. Fort Thomas*, 215 Ky. 384, 285 S. W. 228, P. U. R. 1927A, 691; *Eastern Kentucky Home Tel. Co. v. Dempster Constr. Co.*, 217 Ky. 762, 290 S. W. 684; *Rockport Coal Co. v. Tilford*, 222 Ky. 288, 300 S. W. 899.

Louisiana. *New Orleans City & c. R. Co. v. New Orleans*, 44 La. Ann. 728, 11 So. 78; *Shreveport Trac. Co. v. Kansas City & c. R. Co.*, 119 La. 759, 44 So. 457.

Maine. Rockland Water Co. v. Rockland, 83 Maine 267, 22 Atl. 166.
Maryland. Kirby v. Citizens R. Co., 48 Md. 168, 30 Am. Rep. 455.

Massachusetts. Jamaica Pond Aqueduct Co. v. Brookline, 121 Mass. 5; Commonwealth v. Matthews, 122 Mass. 60; New England Tel. & T. Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835.

Michigan. McIlhinney v. Trenton, 148 Mich. 380, 111 N. W. 1083, 10 L. R. A. (N. S.) 623, 118 Am. St. 580, 12 Ann. Cas. 23; Monroe v. Detroit, M. & C. Short Line R. Co., 143 Mich. 315, 106 N. W. 704; Grand Rapids, G. H. & C. R. Co. v. Stevens, 219 Mich. 332, 189 N. W. 2; Red Star Motor Drivers Assn. v. Detroit, 234 Mich. 398, 208 N. W. 602; Bay City Plumbing & C. Co. v. Lind, 235 Mich. 455, 209 N. W. 579; Highway Motorbus Co. v. Lansing, 238 Mich. 146, 213 N. W. 79.

Minnesota. Stillwater Water Co. v. Stillwater, 50 Minn. 498, 52 N. W. 898; Cater v. Northwestern Tel. Exchange Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. 543; Duluth v. Duluth St. R. Co., 172 Minn. 187, 215 N. W. 69.

Mississippi. Scott v. Hart, 128 Miss. 353, 91 So. 17.

Missouri. State v. Murphy, 134 Mo. 548, 31 S. W. 784, 34 L. R. A. 369, 56 Am. St. 515; State v. Public Service Commission, 301 Mo. 179, 257 S. W. 462, P. U. R. 1924C, 354; National Waterworks Co. v. Kansas City, 20 Mo. App. 237.

Montana. Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102, 29 Pac. 883; State v. Billings Gas Co., 55 Mont. 102, 173 Pac. 799.

Nebraska. Omaha, L. & B. R. Co. v. Lincoln, 97 Nebr. 122, 149 N. W. 319; Omaha & Council Bluffs St. R. Co. v. Omaha, 114 Nebr. 483, 208 N. W. 123, P. U. R. 1926D, 629; Peterson v. Beal, 121 Nebr. 348, 237 N. W. 146, P. U. R. 1931E, 433.

Nevada. Ex parte Anderson, 49 Nev. 208, 242 Pac. 587.

New Mexico. City Elec. Co. v. Albuquerque, 32 N. Mex. 397, 258

Pac. 573; Albuquerque v. City Electric Co., 32 N. Mex. 401, 258 Pac. 574.

New Jersey. Water Comrs. v. Hudson, 13 N. J. Eq. 420; State v. Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; General Omnibus Co. v. Board of Comrs., 96 N. J. L. 37, 114 Atl. 152; Trenton & County Trac. Corp. v. Trenton, 97 N. J. L. 84, 116 Atl. 321, affd. in 98 N. J. L. 297, 119 Atl. 31.

New York. Milhau v. Sharp, 17 Barb. (N. Y.) 435, affd. in 7 Abb. Prac. 220, 9 How. Pr. 102, 28 Barb. 228; In re Deering, 93 N. Y. 361; People v. Barnhard, 110 N. Y. 548, 18 N. E. 354; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. 764; Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277; People v. Western New York & C. Trac. Co., 214 N. Y. 526, 108 N. E. 847; Phoenix v. Gannon, 195 N. Y. 471, 88 N. E. 1066; Farnsworth v. Boro Oil & C. Co., 216 N. Y. 40, 109 N. E. 860, P. U. R. 1916F, 956; Holmes Elec. Protective Co. v. Williams, 228 N. Y. 407, 127 N. E. 315, P. U. R. 1920E, 75; Transit Comm. v. Long Island R. Co., 253 N. Y. 345, 171 N. E. 565, P. U. R. 1930D, 394; New York v. Prendergast, 202 App. Div. 308, 195 N. Y. S. 815, P. U. R. 1924A, 530; Marjohn Realty Co. v. Long Beach, 122 Misc. 763, 204 N. Y. S. 53, affd. in 211 App. Div. 805, 206 N. Y. S. 933, and 211 App. Div. 860, 207 N. Y. S. 876.

North Carolina. Elizabeth City v. Banks, 150 N. Car. 407, 64 S. E. 189, 22 L. R. A. (N. S.) 925.

Ohio. Columbus Gaslight & C. Co. v. Columbus, 50 Ohio St. 65, 33 N. E. 292, 19 L. R. A. 510, 40 Am. St. 648; Lorain St. R. Co. v. Public Utilities Comm., 113 Ohio St. 68, 148 N. E. 577, P. U. R. 1926A, 649; Ohio Elec. Power Co. v. State, 121 Ohio St. 233, 167 N. E. 377.

Oklahoma. Tulsa v. Thomas, 89 Okla. 188, 214 Pac. 1070, P. U. R. 1923D, 653.

Oregon. Dent v. Oregon City, 106 Ore. 120, 211 Pac. 909.

§ 494. Public control of streets and franchises complete.²—

The case of *Grand Rapids Electric Light & Co. v. Grand Rapids Edison Electric Light & Co.*, 33 Fed. 659, decided in 1888, furnishes a clear and comprehensive statement to the effect that primarily the control of all streets and highways belongs absolutely to the state which holds it in trust for the use and benefit of the public, for as the court said: "The legislature of the state represents the public at large, and has full and paramount au-

Pennsylvania. *Monongahela City v. Monongahela Elec. Light Co.*, 3 Pa. Dist. R. 63; *Frankford & C. R. Co. v. Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242; *Scranton Gas & C. Co. v. Scranton*, 214 Pa. 586, 64 Atl. 84, 6 L. R. A. (N. S.) 1033, 6 Ann. Cas. 388; *Jitney Bus Assn. v. Wilkes-Barre*, 256 Pa. 462, 100 Atl. 954, P. U. R. 1917F, 903; *Harmony Elec. Co. v. Public Service Comm.*, 275 Pa. 542, 119 Atl. 712, P. U. R. 1923C, 798.

South Carolina. *Charleston Consol. R. & Light Co. v. Charleston*, 92 S. Car. 127, 75 S. E. 390.

Texas. *Greene v. San Antonio* (Tex. Civ. App.), 178 S. W. 6; *San Antonio v. San Antonio St. R. Co.*, 15 Tex. Civ. App. 1, 39 S. W. 136; *Texarkana v. Southwestern Tel. & T. Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915; *Graham v. Seal* (Tex. Civ. App.), 235 S. W. 668; *San Antonio v. Fetzer* (Tex. Civ. App.), 241 S. W. 1034, P. U. R. 1923E, 423; *Davis v. Houston* (Tex. Civ. App.), 264 S. W. 625; *Malott v. Brownsville* (Tex. Civ. App.), 292 S. W. 606.

Utah. *Henderson v. Ogden City R. Co.*, 7 Utah 199, 26 Pac. 286.

Vermont. *Barre v. Barre & C. Power & Trac. Co.*, 88 Vt. 304, 92 Atl. 237; *Burlington Light & C. Co. v. Burlington*, 93 Vt. 27, 106 Atl. 513; *West Rutland v. Rutland R. Light & C. Co.*, 96 Vt. 413, 121 Atl. 755, P. U. R. 1924A, 380.

Virginia. *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665; *Norfolk R. & Light Co. v. Corletto*, 100 Va. 355, 41 S. E. 740; *Taylor v. Smith*, 140 Va. 217, 124 S. E. 259; *Gruber v. Commonwealth*, 140 Va. 312, 125 S. E. 427; *J. E. Sheets Taxi-*

cab Co. v. Commonwealth, 140 Va. 144, 125 S. E. 431; *Carroll v. Commonwealth*, 140 Va. 305, 125 S. E. 433; *Bowman v. Commonwealth*, 140 Va. 118, 125 S. E. 435.

Washington. *Seattle v. Columbia & C. R. Co.*, 6 Wash. 379, 33 Pac. 1048; *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; *McGloth-ern v. Seattle*, 116 Wash. 331, 199 Pac. 457; *International Motor Transit Co. v. Seattle*, 141 Wash. 194, 251 Pac. 120; *Burkheimer v. Seattle* (Wash.), 299 Pac. 381.

West Virginia. *Clarksburg Elec. Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840, P. U. R. 1915E, 93; *Wheeling v. Chesapeake & Potomac Tel. Co.*, 82 W. Va. 208, 95 S. E. 653, P. U. R. 1918F, 408; *Bluefield v. Public Service Comm.*, 94 W. Va. 334, 118 S. E. 542.

Wisconsin. *Ashland St. R. Co. v. Ashland*, 78 Wis. 271, 47 N. W. 619; *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181; *Washburn Water Works Co. v. Washburn*, 129 Wis. 73, 108 N. W. 194; *State v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108; *Milwaukee v. Milwaukee Elec. R. & Light Co.*, 173 Wis. 400, 180 N. W. 339, mod. in 173 Wis. 411, 13 A. L. R. 802, 181 N. W. 821, P. U. R. 1920F, 561; *Vanderwerker v. Superior*, 179 Wis. 638, 192 N. W. 60, P. U. R. 1923C, 236.

² This section (§ 398 of 2d edition) cited in *Star Transp. Co. v. Mason City*, 195 Iowa 930, 192 N. W. 873, and *State v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799.

thority over all public ways and public places.' 'To the commonwealth here,' says Chief Justice Gibson, 'as to the king of England, belongs the franchise of any highway as a trustee of the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads laid out by the authority of the quarter sessions.'³ * * * 'As the highways of a state, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may be put, depends entirely upon their charters or legislative enactments applicable to them.' 2 Dillon Municipal Corporations (3d ed.), section 680. It is also well settled that the right to use the streets and other public thoroughfares of a city for the purpose of placing therein or thereon pipes, mains, wires, and poles for the distribution of gas, water, or electric lights for public and private use, is not an ordinary business in which any one may engage, but is a franchise belonging to the government, the privilege of exercising which can only be granted by the state or by the municipal government of the city, acting under legislative authority."

This principle of the power and duty of cities to regulate the use of their streets is well expressed in the case of *Peoria v. Postal Telegraph-Cable Co.*, 274 Ill. 568, 113 N. E. 968, as follows: "All city authorities in this state have control over the streets and alleys of such cities, and it is their duty to keep such streets and alleys in reasonably safe condition for travel. Those duties require inspection by the city authorities, and if they do not exercise reasonable care in the performance of those duties, they are liable to persons that may be injured by reason of such failure. It has been frequently held that a telegraph company, though engaged in interstate commerce, may be compelled by a municipality to pay a reasonable charge to defray the cost of local governmental supervision and inspection of its poles and wires. In some instances such charge has been imposed and upheld as a rental where the municipality has such an interest in its streets as entitles it to make a rental charge and such rental is not shown to be unreasonable. *City of Springfield v. Postal Tel. Co.*, 253 Ill. 346, 97 N. E. 672; *City of St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct.

³ Dillon, *Mun. Corp.* (5th ed.),
§ 1122.

485, *supra*. A municipality may also require such a telegraph company to pay a license fee not to exceed the probable expenses incident to the issuing of the license and to such supervision, regulation, and inspection."

The control of the state over its streets and highways is well defined and the principle governing their use as places of profit is clearly stated in the leading case of *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942, as follows: "If any proposition may be said to be established by authority, the right of the state in the exercise of its police power to prohibit the use of the streets as a place of private business or as the chief instrumentality in conducting such business, must be held so established. Nor can it be questioned that the power to prohibit includes the power to regulate even to the extent that the regulation under given conditions may be tantamount to a prohibition. Where the power to prohibit exists, the reasonableness of any regulation is palpably a legislative question, pure and simple. To hold otherwise would be to assert an absurdity. When the legislature acts within its constitutional authority in the exercise of the police power, the expediency of its action is not a question for the courts. In such a case, the power once being established, the legislature determines by the enactment itself that the law is reasonable and necessary. *State v. Mayo*, 106 Maine 62, 75 Atl. 295, 298, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512."

§ 495. **Municipal control of streets delegated by state.**—Having absolute control of the streets and highways, the state may grant the right to use them to municipal public utilities, either directly or through its agent, the municipality. As the court expressed it in the case of *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181, decided in 1902: "That the highways of the state are under the control of the general state government, and that the right to use the same for telegraphs, telephones, water pipes or street railways is by franchise emanating from the state, is declared in many of the foregoing decisions.⁴ * * * As a corollary, it results that the municipal corporations have power to make such grants only by delegation from the state."

The relative rights of the state and municipality to the control of its streets and the local consent necessary to install and

⁴ See *State v. Madison St. R. Co.*, 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771; *Marshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735, 44

L. R. A. 565; *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

operate public utilities under the principle of commission control is well expressed in the case of *Oro Electric Corp. v. Railroad Commission*, 169 Cal. 466, 147 Pac. 118, P. U. R. 1915C, 191: "The granting or withholding of the certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public. See *People v. Willcox*, 207 N. Y. 86, 100 N. E. 705, 45 L. R. A. (N. S.) 629. This is an entirely different question from that of the local control of the streets, and power over the two subjects may well be vested at the same time in different governmental bodies, without the one in any way clashing with or interfering with the other. The railroad commission might grant a certificate authorizing a public utility to engage in its business in a given city, but the certificate would not authorize the use of the streets, unless the right to so use them had been given by the authority vested with the power to grant such right. This is recognized by subdivision 'c' of section 50 itself, where we find an express provision that the applicant shall furnish to the commission evidence that the required local consent, franchise, or permit has been obtained. On the other hand, the fact that a city may, in the exercise of its control over its own streets, give or withhold the right to use its streets, has no direct bearing upon the power to decide whether or not a given business, in the conduct of which the use of the streets may be convenient or necessary, shall be carried on. Where there is this limited control, its exercise is not impaired by legislation under which the state reserves to itself the determination of how far, if at all, the given business may be conducted. The city's powers are fully preserved if its streets are not occupied, except by its consent, given as provided by law. * * * The result of all that has been said is that, in our judgment, the city of Stockton did not, when the Public Utilities Act was passed or when it became effective, have power to grant to electric corporations franchises permitting them to furnish electricity to the inhabitants of the city, if, indeed, it had the power to grant the limited franchise or right to use the streets for that purpose."

Where the legislature gave the municipality "entire jurisdiction and control" over its streets, the municipality, by proper ordinance, may require motor buses operating thereon for hire to have a permit to use its streets as is indicated in the case of *Cutrona v. Wilmington*, 14 Del. Ch. 434, 127 Atl. 421, where the court said: "When, therefore, the meaning of the word 'pre-

scribe,' as above defined, is read in connection with the word 'use,' as well as in connection with the words 'entire jurisdiction and control,' it is clear that the legislature intended to grant broad powers over the city streets to the street and sewer department, and that the enactment of the ordinance of March 31, 1922, requiring a permit to use such streets for the operation of motor buses transporting passengers for hire, was within the powers granted that department. * * * It is further argued that the legislature, without expressly granting the right, has by regulatory legislation impliedly recognized the lawfulness of the business of operating motor buses for the transportation of passengers for hire on the public highways of the state, and that the city of Wilmington, therefore, had no power to interfere with that right with respect to the use of the public highways within its limits. * * * Even conceding the correctness of the principle relied on, where the legislature has neither prohibited nor authorized the prohibition of the use of the streets of the city by motor vehicles of the kind in question (*Dickey v. Davis*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 841), we are unable to see how the statutes in question have any application to appellant's contention."

A municipality with authority to make local police regulations may so regulate its street traffic as to make it less dangerous and congested for pedestrians and the public generally, so long as such regulations do not materially interfere with the efficiency of public utilities, operating under the control of the public utilities commission, for as the court said in the case of *Lorain St. R. Co. v. Public Utilities Comm.*, 113 Ohio St. 68, 148 N. E. 577, P. U. R. 1926A, 649: "And by the terms of said section the power of municipalities to make reasonable local police regulations within their respective boundaries is recognized. Therefore the court is of opinion that, if the municipality does not interfere with the general powers of the public utilities commission, it may, by suitable police regulations, control, direct, and manage its streets and the traffic thereon, and the conclusion reached is that these ordinances are not an unreasonable local police regulation relating to traffic, reciting as they do that it is intended to make the streets less congested and less dangerous to pedestrians and the public generally, and may be so enforced as not to materially lessen the efficiency of the utility. Of course, under the guise of so regulating traffic, a city may not materially interfere with the general efficiency of the utility authorized by the public utilities commission within its jurisdiction."

§ 496. **Power must be expressly or clearly delegated.**—Where the state has delegated certain authority to the municipality to grant franchise privileges to the municipal public utility and to regulate and control the streets, the municipal corporation has only such powers in these respects as are clearly conferred upon it by the statute and any grant of the municipality not covered by the authority delegated to it is void for want of authority in the municipality to make, for as the court in the case of *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, 47 N. E. 277, decided in 1897, said: "The authority to make use of the public streets of a city for railroad purposes primarily resides in the state, and is a part of the sovereign power; and the right or privilege of constructing and operating railroads in the streets, which, for convenience, is called a 'franchise,' must always proceed from that source, whatever may be the agencies through which it is conferred. The use or occupation of the streets for such purposes, without the grant or permission of the state through the legislature, constitutes a nuisance, which may be restrained by individuals injuriously affected thereby.⁵ The city authorities have no power to grant the right except in so far as they may be authorized by the legislature, and then only in the manner and upon the conditions prescribed by the statute.⁶ * * * The legislature, however, in virtue of its general power over municipalities, may regulate the mode and manner in which such consent shall be given by the authorities having the control of the street, and may prescribe the conditions upon which it may be given, and all these matters have been regulated by statute."

An early decision defining the manner in which franchise rights to use the streets may be conferred by the municipality only on authority delegated to it expressly or by necessary implication is that of *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561, decided in 1881, where the court held that the power to confer the necessary franchise rights to install and operate a street railway system is not covered by the ordinary general powers provided in the charter of the municipality, but that being an extraordinary power it must be expressly conferred, for as the court said: "Such an authority must, it is true, be conferred by statute, but it is not indispensably essential that the grant should be stated in express words. If it is conferred by necessary implication, it will be upheld and enforced.

⁵ *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307. *Kerr*, 27 N. Y. 188, 25 How. Pr. 258; *Milbau v. Sharp*, 27 N. Y. 611, 84

⁶ *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *People v.* Am. Dec. 314.

But the grant must be conferred either by express words or be necessarily implied. Without such a grant the public streets can not be used by a railroad corporation for the transportation of passengers for hire. The right to so use the streets is a franchise, and such a franchise as can only exist by force of a legislative grant. The power to grant franchises is a high legislative trust."

§ 497. Delegated power may be revoked or modified by state.

—From the fact that all control over streets is vested in the state, it necessarily follows that any power delegated by it to the municipality may be modified or withdrawn by the state and that it may grant franchise rights to the use of the streets of any municipality, although it may have delegated the right to make such grants to the municipality except in cases of constitutional provision to the contrary or where such action would result in the impairment of contract rights prohibited by the constitution, for as the court in the case of *Newcastle v. Lake Erie &c. R. Co.*, 155 Ind. 18, 57 N. E. 516, decided in 1900, said: "The control of streets, as well as of all other public highways, is primarily in the legislature. But the legislature has delegated to municipalities the exclusive control of their streets and alleys. As the legislature gave, so that body may take away or modify, the power. There is no doubt of the legislature's authority to grant railroad companies the right to lay their tracks longitudinally upon the streets of a municipality without its consent or over its objection."

A decision of the Supreme Court of Florida to the same effect is furnished in the case of *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 10 So. 590, decided in 1892, where the court held that the right to control the use of streets belongs primarily to the state, and it may delegate it to the municipality, but this must be done expressly by statute before the municipal corporation has the power to grant such franchise rights and that such delegation of power does not in itself prevent the granting of similar rights by the state itself, for as the court said: "The legislature has undoubtedly supervision and control of highways and streets, and may authorize the construction of a railroad, operated either by steam or animal power, across or along them. This results from the dominant power which the state possesses over all its highways; and it may be done without the consent of municipal authorities." ⁷

⁷ *Savannah & Thunderbolt R. Co. v. Savannah*, 45 Ga. 602; *Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561; *Hodges v. Balti-*

That the state may assume control over the use of its streets by motor vehicles operating over them for hire is clearly decided in the case of *Vanderwerker v. Superior*, 179 Wis. 638, 192 N. W. 60, P. U. R. 1923C, 236: "By the adoption of the so-called Jitney Law (chapter 546 of Laws 1915, now sections 1797-62 to 1797-68) the legislature, through its administrative body, the railroad commission, assumed jurisdiction over the subject-matter of such service as that which is concededly being afforded by the plaintiffs—that is, street transportation by motor vehicles similar to that afforded by street railways. *Monroe v. R. R. Com.*, 170 Wis. 180, 174 N. W. 450, 9 A. L. R. 1007, note at page 1011. * * * To uphold the ordinance is to substantially nullify the certificate of the railroad commission. This can not and ought not be done. The legislative control, either directly or through its designated administrative body, is superior to any conflicting action of the legislative body of the municipality."

The state may regulate the use of its highways and require a bond for the protection of the public and the payment of a reasonable tax by all common carriers using the highways in conducting their business for hire. And as the state may prohibit such use of its public highways, the matter of the reasonableness of the restrictions, which it may place upon such use, rests in the discretion of the legislature, and, being legislative rather than judicial, the court will not interfere, unless such regulations are arbitrary, unfair or clearly unreasonable. This principle is established as follows in the case of *Smallwood v. Jeter*, 42 Idaho 169, 244 Pac. 149, where the court said: "Section 3 of the act provides that every 'auto transportation company' shall, 'before engaging in such business,' procure liability and property damage insurance; and section 5, that such company shall file a monthly report, and pay a fee of five per cent of its gross earnings for freight and passengers transported. A reasonable construction of this act arrives at the legislative intent to regulate auto transportation companies which 'engage in business' as such. * * * The bonding feature is entirely a police regulation. Imposing the obligation of furnishing an indemnity bond for damage to the property carried has, so far as a private carrier is concerned, no relation to public safety or order in the use of motor vehicles upon the highways, or to collection of com-

pensation for the use of the highways. * * * The act must therefore be construed as not applicable to private carriers, but as regulating those who are in their nature common carriers, those who hold themselves out to the public as ready and willing to carry passengers who present themselves, or freight presented. Thus, the act is not an imposition of a license tax upon one carrying property in the capacity of a private carrier, not holding himself out to the public as a common carrier. * * * The wisdom of requiring a bond from those who would engage in auto transportation is a matter in the discretion of the legislature, and, unless wholly unreasonable in amount, or confiscatory and prohibitive of a business which may not be prohibited, the amount is likewise discretionary. * * * The legislature has the right to impose a business tax for revenue above the cost of regulation. If plaintiff means that the tax is in excess of the value of the use, or privilege of the use, of the public highways as a place to transact his business, he has pleaded no facts as to the amount or value of such use or privilege, and the allegation is a mere conclusion of law not admitted by the demurrer; and plaintiff can not be permitted to impose his judgment against that of the legislature as to the value of the use or privilege of such use. Auto transportation companies are not regulated in their charges by the public utilities commission, or any legislative enactment fixing such charges. A charge of five per cent of the gross earnings does not appear so exorbitant or unreasonable as to make it unconstitutional. There is nothing to prevent such carriers increasing their charges to an amount sufficient, in addition to their present contemplated gross earnings, to cover the amount of this tax. The fact that an auto business will not pay for operation and protection of the passengers is no argument for its conduct without such protection; or, that a business will not pay a license tax which the legislature has the power to exact, and leave a margin of profit, is no just cause for foregoing the tax. * * * Granted the power to prohibit the use of public highways for the purpose of one engaging in business thereon, the question of the reasonableness of restrictions placed upon the use is a matter for the legislature and not for the court. * * * It is a license tax laid, not upon the vehicle, but upon the privilege of using the highways for business purposes."

This principle, permitting the state to require motor vehicles operating for hire upon its highways to furnish proper securities for the payment of any injury caused by the negligent operation or defective construction of such motor vehicles, is sus-

tained by the court of Nebraska, which expressly found that such regulations are consistent with the constitution of the state and with the powers conferred upon the state railway commission, in the case of *Peterson v. Beal*, 121 Nebr. 348, 237 N. W. 146, P. U. R. 1931E, 433, where the court spoke as follows: "It may be said generally that statutory provisions requiring those engaged in or causing the operation of motor vehicles, or certain classes of them, to furnish securities for the benefit of any person who may be injured through negligent or faulty operation have been enacted in many states; and the decisions are uniform in upholding the power to prescribe such regulations. * * * Unquestionably the state has the right to require persons engaged in the business of carrying passengers for hire in motor vehicles upon public streets and public highways to file securities or insurance for the payment of judgments for death or injury to person or property caused in the operation or by defective construction, of such motor vehicles. * * * Nor do we find that in the adoption of Resolution 110 the Nebraska state railway commission exceeded the powers possessed by it. The constitutional provision controlling, adopted in 1906 as a separate and independent amendment to the constitution, created a state railway commission, and further provides: 'The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.' Constitution article 4, section 20. * * * Therefore, in the light of the constitutional provision quoted and referred to, as well as the express terms of House Roll 306, we are of the opinion that Resolution 110 was within the power of the commission to lawfully adopt and enforce."

The state, as a means of regulating the use of its highways by motor vehicles for hire, may require the securing of a license; and the fact that such licenses can only be required for the use of improved highways does not relieve a common carrier from securing same, whose line of operation extends beyond any improved highway, for as the court said in the case of *Ex parte Anderson*, 49 Nev. 208, 242 Pac. 587: "It is conceded that the petitioner when arrested was engaged in transporting persons and property for hire by motor vehicle over the public highway between fixed termini, to wit, between Minden in Douglas county and Fredericks Ranch in Mineral county. In transporting per-

sons and property for hire in his established line he traveled over a first-class highway as defined by the statute between fixed termini, * * *. It is conceded that this particular first-class highway was constructed or improved with federal, state, and county aid and is under the control of the state highway department. The question for determination is whether the transportation by the petitioner of persons and property for hire over this particular first-class highway is within the meaning of the statute. Section two of the act is a legislative declaration to the petitioner that in order for him to operate over any first-class highway he must procure the license in the manner provided in the section. The fact that the petitioner's established line extends beyond the termini of the first-class highway traveled is no argument against the validity of the statute."

This principle, permitting the state to regulate the use of its highways, either directly or through its commission, is reiterated by the court of Colorado, in the case of Greeley Transp. Co. v. People, 79 Colo. 307, 245 Pac. 720, P. U. R. 1926D, 433, as follows: "This section [C. L. 1921, § 2961], it will be observed, provides for a complete judicial review, in which even the justness and reasonableness of the commission's order may be inquired into, and that order affirmed, revoked, or modified; that such review shall be had in the Supreme Court; and that the district court is without jurisdiction thereof. * * * Both rule and statute thus require that, in case the original jurisdiction prohibited to the district court and conferred upon the Supreme Court be held unconstitutional, the remedy provided must stand, and the writ be sued out of the district court as commanded by the constitution. This conclusion appears to us so inevitable that further elucidation becomes superfluous. * * * When the common carrier seeks to utilize public property such as streets and highways, in the operation of that business, obligation and authority become twofold. One may have an unquestionable constitutional right to engage in a legitimate mercantile business, but he has no right to establish that business in the corridors of the state house. Were the law otherwise, the very citizens who build and maintain these avenues of travel might be entirely driven from them by usurpers. The authorities upholding this legislative power are numerous."

§ 498. **Streets dedicated in trust for benefit of public.**—The fiduciary obligation imposed upon the state or its agency, the municipality, to regulate and control the use of streets and highways in the interest and for the benefit of the public and the

right of the state at any time to revoke the exercise of any power that it may have delegated to the municipality in this respect is well stated in the case of *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393, decided in 1893, where the court said: "By the platting of the village, the streets, in their entire width and length, were dedicated to the use of the public as streets. The village thereby became seized in fee of the streets and alleys, for the use of the local and general public, holding them in trust for such uses and purposes, and none other."⁸

* * * These municipal corporations are instrumentalities of the state, exercising such powers as are conferred upon them in the government of the municipality. Their power is measured by the legislative grant, and they can exercise such powers only as are expressly granted or are necessarily implied from the powers expressly conferred. The legislature, representing the great body of the people of the state, when no private right is invaded or trust violated,⁹ * * * may repeal the law creating them, or exercise such control in respect of the streets, alleys, and public grounds within the municipalities of the state as it shall deem for the interest of the people of the state."¹⁰

The power of local control of municipalities over their streets under state commission control in Missouri is defined in the case of *State v. Public Service Comm.*, 301 Mo. 179, 257 S. W. 462, P. U. R. 1924C, 354: "Let it be granted, therefore, that the manner in which a street or road crossing is to be installed, used, and maintained has been delegated to the public service commission; the right in the first instance to grant or refuse this privilege has been reserved to the municipal authorities. That this division of the police power has been wisely determined, no one familiar with the organization of cities and counties and the consequent importance, if not the necessity, of investing them with the right to control their highways, will deny. * * * Municipalities have always possessed, and under our system of laws still retain power to control their streets and roads. The pri-

⁸ *Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479; *Chicago v. McGinn*, 51 Ill. 266, 2 Am. Rep. 295; *Carter v. Chicago*, 57 Ill. 283; *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; *Kreigh v. Chicago*, 86 Ill. 407; *Lee v. Mound Station*, 118 Ill. 304, 8 N. E. 759.

⁹ *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540.

¹⁰ *Chicago v. Rumsey*, 87 Ill. 348; *People v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135; *Chicago v. Union Bldg. Assn.*, 102 Ill. 379, 40 Am. Rep. 598; *West Chicago Park Comrs. v. McMullen*, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215; *Dillon, Mun. Corp.* (5th ed.), § 541.

mary right to exercise this power was not abrogated by the enactment of the Public Service Act."

§ 499. Title to street in municipality held in trust for public.—Although the fee of the street may be in the municipality, it does not own the fee in the street absolutely, but holds it as trustee for the benefit of the public, although the funds of the municipality may have been used in the purchase of the street in the exercise of the power of eminent domain; nor does the municipality have the power, unless clearly authorized by statute, to grant franchise rights to the use of the streets for private purposes, for as the court in the case of *Stanley v. Davenport*, 54 Iowa 463, 2 N. W. 1064, 37 Am. Rep. 216, decided in 1880, said: "The fee of the streets is in the city, and yet it is held in trust for the use and benefit of the public. The city does not have the authority to sell and convey the title held by it or authorize the streets to be used for private purposes. Nor can it without legislative authority grant the use of a street for a public purpose, which renders it dangerous for the public to travel over it in any other manner. The power partakes of that of eminent domain, which, under our government, can only be granted by the law-making power of the state. Streets and highways are under the exclusive control of the general assembly. It matters not if the fee of the streets is in the city, it has no authority to control or grant rights and privileges thereto or thereon, unless it has been so authorized. The power and authority of the city is contained in its charter and bounded thereby. It has no other or different control of the streets than is prescribed in the charter or the general statutes of the state."

The distinction between the ordinary use of the street for transportation and its use as a place of business for profit is well expressed in the case of *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840, P. U. R. 1915E, 93: "The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader, the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature."

To the same effect that the city has the power of local control over the use of its streets for profit is clearly decided in *Greene v. San Antonio* (Tex. Civ. App.), 178 S. W. 6, which defined the right of the local regulation of jitneys as follows: "The right to solicit passengers and convey them for hire from one part of the city to another, as appellant does, is a privilege, a right, or a power, which he can not exercise as of right, but its lawful existence must depend upon a grant whose character will not be changed by calling it a franchise, a privilege, or a license. The rights given could, with proper propriety, be named a franchise.

* * * The drivers of jitney cars have placed in their charge and keeping the lives of men, women, and children, and it would not only be unreasonable, but criminal, for the city to turn them loose on the streets unrestrained by any restrictions. Every owner of an automobile is required to obtain a license before he can use the streets and roads, and why should not the owner of a car who carries passengers for hire be required to obtain a license and be subject to inspection and regulation. If such vehicles are to be permitted on the streets, no valid reason can be given for not requiring them to serve the public to the best advantage, and as that will be attained by a regular route and regular schedule, they have been prescribed. * * * The jitney service of the country is of such recent date that there are but few cases which have arisen in connection with its regulation, but regulation of such service is in no wise different from the regulation of any trade or business, or the running of stages or street cars on the streets, and decisions on those subjects are directly applicable to this new trade, occupation, or business of carrying people from one part of the city to another for five cents a person."

The control of cities over their own streets is clearly pointed out in the case of *Davis v. Houston* (Tex. Civ. App.), 264 S. W. 625: "The authority of a city to regulate or even prohibit the use of its streets for the conduct thereon of business of any kind can not be questioned, and the right to such use can only be acquired by a grant or license from the city. * * * In so far as plaintiff passengers are concerned, no one would contend that the ordinance in question injures or invades any property right of theirs. They certainly acquired no such vested property right in the means of transportation furnished by the jitney operators under license from the city as would entitle them to enjoin the city from discontinuing granting such license. *Greene v. San Antonio* (Tex. Civ. App.), 178 S. W. 6; *Wade v. Nunnally*, 19

Tex. Civ. App. 256, 46 S. W. 668. * * * The general right of a city in the exercise of its police powers to regulate and control the use of its streets is not questioned by appellants, but they contend that this ordinance which prohibits the use of the streets for the operation of jitneys as that business is defined in the ordinance is beyond the power of the city. This contention is not supported by any authority."

To the same effect, in holding that the city may license and control the use of its streets for profit, the court in the case of *Star Transportation Co. v. Mason City*, 195 Iowa 930, 192 N. W. 873, said: "The city has power to license and regulate unless the legislature, by the motor vehicles acts, has repealed or withdrawn the power theretofore granted to cities and towns authorizing them to license and regulate business of this character. It may be conceded that in a number of instances some of the prior provisions are inconsistent with some of the provisions of the motor vehicle acts, and as to such, of course, the prior power granted is withdrawn. * * * That a person's making extraordinary use of the streets as here is a privilege, and not a matter of right, and that under such circumstances plaintiff has not the right to use the streets without the consent of the city, see 4 *McQuillin, Municipal Corporations*, section 1620; *Dillon, Municipal Corporations* (5th ed.), 1210; *Pond, Public Utilities*, section 398."

Where the title to the fee of its streets is in the municipality, it may prohibit the stretching of wires along or across its streets or public ground, because of this fact and for the further reason that the municipality may control the use of its streets in the exercise of its police power. This is the effect of the decision in the case of *Ackley v. Central States Electric Co.*, 204 Iowa 1246, 214 N. W. 879, 54 A. L. R. 474, P. U. R. 1927E, 325, where the court said: "The question therefore is whether or not he has the right to stretch these wires across the streets and alleys of the plaintiff town. Authorities bearing on this proposition are not very numerous, and among those found many have no application as, under the law of Iowa, municipalities own a fee-simple title to the streets within their boundaries. * * * It is apparent from what has already been said by this court and the courts of our sister states that an attempt to or the placing of these wires across this street would be an invasion of the rights of the city, and wholly without right or authority of law. Such action on the part of the defendant being wrongful and unlawful, it must, of course, be said that the same would create a

nuisance under the many decisions heretofore cited. We are therefore of the opinion that the defendants had no right to stretch these wires across the streets or public grounds of the plaintiff, and therefore plaintiff was rightfully granted the temporary writ. However, from another angle, the city being the owner in fee-simple of the streets, of necessity its rights extend above the surface thereof. How far we need not determine in this case; but, being entitled to the absolute control and occupancy of the space above these streets, any invasion thereof by stretching wires thereon at this height of necessity is an infringement of the rights of the city, and amounts to a trespass. Especially must this be true where the invasion is by wires charged with electrical energy that may be dangerous to the public."

A municipality, having authority to regulate the use of its streets, may require a local telephone exchange to secure a franchise permitting its use of the streets as a condition precedent to the installation of such a plant, even in connection with its long distance system, operating under state authority, for as the court said in the case of *Cherokee v. Northwestern Bell Tel. Co.*, 199 Iowa 727, 202 N. W. 886: "The construction contended for by appellant would give a telephone company the undoubted right, without obtaining any franchise or grant from a local municipality, to enter upon the streets of such municipality for the avowed purpose of carrying a long-distance line through the city or town and then having done so, under the general legislative grant, proceed to occupy any or all of the streets and alleys of the municipality with numerous poles and wires under the claim that it had the right so to do because by this means it was merely carrying its long-distance system to each of its customers. By such a method no telephone company would find itself confronted with any necessity of obtaining a franchise to conduct a telephone exchange in any town or city of the state. Every local exchange would be instantly metamorphosed into a mere 'long-distance system' with every telephone converted into a 'toll station' and the business of the local exchange claimed by the telephone company to be merely incidental to this widely diversified long-distance business. These considerations are not determinative of appellant's legal rights but they are worthy of consideration in deciding the question as to whether we should now overrule our former decisions and place a construction upon the statutes that would practically abrogate the provisions regarding the securing of a franchise to operate a telephone exchange in a city or town of this state. We are not disposed to

recede from our former decisions. The case is controlled by the rule of stare decisis. We reaffirm our construction of the statutes as providing that under the general legislative grant a telephone company may carry a long-distance or toll line through a city or town and occupy the necessary street or streets for such purpose, without obtaining a franchise from the municipality, but that a telephone company can not maintain a local exchange for the interchange of messages between the inhabitants of a city or town and use the streets and alleys of such city or town without first obtaining a franchise so to do."

This same court, in a later case, sustained the power of the legislature through its board of railroad commissioners to grant franchises to telegraph and telephone companies to operate their lines along and upon the highways of the state. This rule is set out as follows in the case of Iowa R. & Light Corp. v. Lindsey (Iowa), 231 N. W. 461, where the court said: "The legislature of this state has seen fit in the exercise of this right to grant to telegraph and telephone companies the right to construct their lines upon the highways within the state, and this power has been enlarged to include electric transmission lines. As to the wisdom of this legislation (allowing highly charged electric lines to be constructed upon the highway) we have no concern, as that rests within the sound discretion of the legislature. The legislature later created a board of railroad commissioners and conferred upon it the power of determining whether or not high tension transmission lines should be placed upon any of the highways of the state. The board is given a discretion to determine this question, and their determination, is final unless appealed from. * * * It is obvious, therefore, from this enactment that the board of railroad commissioners has the power to grant the franchise, specifying the terms, conditions, and restrictions thereof, and designating the location and route of these lines, as they may deem just and proper. * * * The legislature empowered the railroad commissioners to authorize the construction of these electric transmission lines on the highways, and we can reach no other conclusion than that when the railroad commissioners granted the franchise, the defendant thereby derived authority from the legislature to place all of its lines within the boundary of the highway. * * * Finally, it may be said that one of the duties of the railroad commissioners in considering the application for this franchise was to determine whether or not transmission lines would interfere with the public use of the highways. This was a prerequisite to the

allowance of the franchise, and was a determination that at the time the condition and use of such highway was such that the erection of this transmission line would in no way obstruct the public use thereof."

§ 500. **Municipal consent condition precedent.**¹¹—Where, however, the right to control the use of the streets is delegated absolutely to the municipality, it may provide its own terms and conditions in connection with the granting of any franchise privileges for their use. Having the sole control, together with the absolute right to stipulate the conditions upon which the use of the streets may be enjoyed, the municipality has the power to prevent their use by municipal public utilities, and unless its authority is modified or revoked, may in effect annul and render void the granting by the state of the franchise right to be a public service corporation by preventing it from exercising its rights as such to install and operate a municipal public utility system within such a municipality, for as the United States Supreme Court said in the case of *Blair v. Chicago*, Illinois, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427, decided in 1906: "What, then, was conferred in the franchise granted by the state? It was the right to be a corporation for the period named, and to acquire from the city the right to use the streets upon contract terms and conditions to be agreed upon. The franchise conferred by the state is of no practical value until supplemented by the consent and authority of the council of the city."

The nature and extent of the control of municipal authorities over the use of their streets is reiterated in the leading case of *State v. Stickelman*, 182 Ind. 102, 105 N. E. 777, as follows: "Here the municipal officers are vested with important discretionary powers, and the courts can not control their exercise by writ of mandate. We do not deem it necessary to determine the question of the right of the legislature to authorize a telephone monopoly in any city. Certain it is that large discretion may constitutionally be vested in municipal authorities over their streets and alleys. There can be no constitutional objection to the vesting of discretionary power in such authorities to refuse the occupancy of streets to companies financially unable to render proper service to the municipality or to its inhabitants, and to refuse such occupancy for an unlimited term. In the very nature of things there must be some limit to the number of telephone and light companies that can serve the public by the use of the

¹¹ This section of third edition *Northern Texas Utilities Co. (Tex. cited in Community Nat. Gas Co. v. Civ. App.)*, 13 S. W. (2d) 184.

streets of a town or city for the location of poles, wires, and necessary appliances. If, as appellant contends, the municipal authorities must grant every applicant for a telephone or electric light franchise the right to use the streets on the same terms accorded corporations now using the same, such streets might be rendered of little use for other purposes. Our legislature has wisely conferred on the municipal authorities a large discretion in the matter of granting municipal franchises, and such delegation of authority is not violative of article 1, section 23, of our Constitution. Our legislation of 1905 does not contemplate a general ordinance for the right to use municipal streets by telephone, electric light, and water companies, but limits such use to such applicants only as have procured from local authorities the consent to such use."

This power of local control of its streets by the municipality even after the creation of the public service commission is well defined by the court in the case of *Barre v. Barre &c. Power & Trac. Co.*, 88 Vt. 304, 92 Atl. 237, as follows: "Charged, as they are, with the duty of maintaining highways for the public use, we think that the statute under consideration, permitting municipalities to agree with street railway companies as to the use of their railways in the streets, has reference primarily to the terms of their use by the public, and necessarily imports the right to make an agreement for a reasonable time as to the fares that shall be charged as a condition of granting to street railway companies the right to construct and operate railways through the streets. Unless the city authorities here had such power, there was no way in which the matter of fares could be brought before the railroad commissioners. * * * The streets of a municipality are emphatically under its control, and such agreements in respect thereto as it makes, by virtue of legislative authority, it may appeal to the courts to enforce, and here the jurisdiction of the court in chancery, with its injunctive power, was properly invoked. It is not within the jurisdiction and power of the public service commission to absolve the defendant from the obligations it undertook in obtaining its franchise, since these obligations were entered into under statutory authority, and since the legislature, if we assume that it could constitutionally do so, has not undertaken to confer such jurisdiction and power. There is, we note, nothing in the bill or plea to indicate that the public service commission asserts or assumes any such jurisdiction or power."

§ 501. **No exclusive use unless expressly provided.**—That the general power to grant such franchise rights to the use of its streets as delegated to municipalities does not give the municipality the right to grant exclusive franchise rights in the use of its streets is the general rule which is well stated by the United States Supreme Court in the case of *Detroit Citizens St. R. Co. v. Detroit Ry.*, 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. 732, decided in 1898, as follows: "That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust, even from the nature of the legislative trust, and those which, without the clearest intention, explicitly declared, insistentlly forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

That the city is strictly limited by statutory authority in its granting of franchises, which may not be made exclusive under implied power, and that such authority is strictly construed, is the effect of the decision in *East Boyer Tel. Co. v. Vail*, 166 Iowa 226, 147 N. W. 327: "That the legislature has the right to control and regulate the use or manner of use of the highways of the state is generally recognized and nowhere denied. And it also is equally true that the powers which it possesses in this respect may be delegated to cities and towns within their territorial limits. Municipal corporations in the exercise of the powers thus delegated are held to a strict observance of the terms of the grant of the statute, and may not exceed them. The right of control of the streets of cities and towns has been conferred by the legislature, and as a limitation upon the right of full and possibly injurious grants of the right of occupancy and use of the streets to public service corporations and bodies of like character there has been enacted Code, section 776, which places the right of ultimate control in the legal voters. * * * The use and control of its public streets is admittedly a matter of police regulation by the municipality. Code, sections 753, 754, 755, 756. In the exercise of this power the municipality, or the voters, if the ultimate voice is lodged in them, may determine to what private uses the streets may be put, governed, as we must presume they would be, by the test as to whether by permitting such private use the right of public enjoyment and use would be impaired. The question is quite different in its rule from

cases when in the control of private business, which does not ask nor rely upon the use of public property, the municipality may take action which would be discriminatory, and therefore within the prohibition of the federal Constitution. But the right to use the streets of a municipal corporation for a private or quasi-public purpose is not under our laws an absolute one. It was governed by the code sections quoted, at the time of the organization of the appellant. It has been deprived of no right which it ever possessed, but, on the contrary, has come within the restrictions which were authorized. At most, it has been denied a privilege, not a right; and that the privilege may have been granted to another does not conflict with the constitutional provision."

§ 502. **No power to alienate or obstruct streets implied.**—A striking illustration of the limitation placed on the power of municipal corporations to grant special rights to the use of their streets is furnished in the case of *McIlhinny v. Trenton*, 148 Mich. 380, 111 N. W. 1083, 10 L. R. A. (N. S.) 623, 118 Am. St. 580, 12 Ann. Cas. 23, decided in 1907, where the court held that unless the municipality was clearly authorized by the legislature it had no power to grant any right to the use of its streets which would interfere with their use by the general public for travel and that any attempt to obstruct them by the erection of municipal buildings or other like structures was entirely unauthorized. In the course of this opinion the court said: "Municipal corporations, notwithstanding their broad and comprehensive powers, have no right, unless authorized by the legislature, to alienate their streets or devote them to the uses inconsistent with the rights of the general public and the abutting landowners. * * * The municipality holds the streets and power to regulate and control them in trust for the public, and can not put them to any use inconsistent with street purposes. Thus cities have no right to use their streets for the erection of municipal buildings or works, and it has been held that placing of a stand-pipe in a public street, the fee of which was in the municipality, was an unlawful use of the street."

A municipal corporation may not authorize a perpetual reservation to any of its streets for any specified use, and mere acquiescence on the part of the municipality in the use of its streets gives no vested interest or property right in the claimant, as is indicated in the case of *West Texas Utility Co. v. Spur*, Texas, 38 Fed. (2d) 466, where the court said: "The claim of the appellant based upon the above set out provision, whereby

the town site corporation undertook to reserve to itself and its assigns the right to make specified uses of dedicated streets, and alleys, is not sustainable. Such a restriction or reservation is void, because it is repugnant to the dedication and is violative of the public policy evidenced by statutes conferring on governing bodies of municipalities power to control such uses of streets and alleys as are referred to in the provision in question. *Roaring Springs Townsite Co. v. Paducah Tel. Co.*, 109 Tex. 452, 212 S. W. 147; Revised Civil Statutes of Texas 1925, articles 1016, 1436.

* * * It is not made to appear that appellant's claim of right to use the city's streets and alleys for its poles and wires is supported otherwise than by the evidence as to the governing body of the city acquiescing in such use of the streets and alleys as was made by the appellant prior to the filing of the bill. It may be assumed that the appellant has such right to the extent of the city's acquiescence in such use of its streets and alleys, as the existence of that right is not now controverted, and interference with the continued use of the city's streets and alleys which had been so acquiesced in was enjoined by the decree appealed from. * * * The evidence did not show that appellant was entitled to relief on the ground that anything done with reference to the establishment and operation of the city's own electric light plant had the effect of unlawfully interfering with contracts between the appellant and its customers."

While local authorities have a wide discretion in granting the right to install public utility equipment in their streets and highways, they may not permit the obstruction of the right-of-way by the erection of such equipment therein, for as the court said in *El Paso Electric Co. v. Leeper* (Tex. Civ. App.), 42 S. W. (2d) 263: "The jury found that the electric company 'was negligent in placing and maintaining the pole at the place it was.' * * * The undisputed evidence showed that the pole in question was some distance from the edge of the traveled or paved part of the highway on either side, and some twenty feet from the center of either of the roads, but was within the right-of-way of each of the highways. * * * While the commissioners' court is vested by law with a wide discretion in the matter of opening and establishing public roads, it can not transcend the powers granted. We think it may not in this instance give the appellant the right to obstruct the road by the erection and maintenance of the pole within the right-of-way of the roads in question. With the facts undisputed that the pole was within the right-of-way of the roads, it can not be successfully con-

tended that the finding of the jury is not supported by the evidence."

§ 503. Telephone and telegraph not limited by local control.—That the best interests of the general public may be better conserved and more comprehensively considered by the state retaining control, rather than delegating it to the different municipalities in the case of such municipal public utilities as the telephone and telegraph where the field of operation extends beyond any particular municipality and is accordingly not local, but may be even interstate in its operations, and may pass through the streets of many municipalities, is well indicated by the case of *Texarkana v. Southwestern Tel. & T. Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915, decided in 1907, where the court said: "The public highways of the state, including even the streets and alleys within incorporated towns and cities, belong to the state, and the supreme power to regulate and control them is lodged with the people through their representatives—the legislature. Whatever power of control is lodged in the city council is delegated by the legislature. When we consider the nature of the business of telegraph and telephone lines in this busy commercial age, we have a most cogent reason for the legislature declining to commit to the arbitrary control of the municipalities throughout the state the use by such companies of the public streets and alleys. These companies are not primarily of local concern, affecting only the inhabitants of the towns and cities through which they pass, but they essentially concern the public at large, in that they furnish quick and cheap means of communication between all points throughout the country, by which a very large percentage of the business of the country is transacted. In other words, the business is such a one as calls for the exercise of state regulation rather than the delegated power of municipal control."

§ 504. Municipal control limited to municipality.—The control of its streets vested in the municipality is naturally limited to the territory included within the municipality and where the service extends beyond its territory, it has no power to regulate any public utility service, and as the service rendered is not local so that the inhabitants of the municipality are not alone concerned it should not be subject to its sole regulation and control. This principle is further illustrated and established by the case of *South Pasadena v. Los Angeles Terminal R. Co.*, 109 Cal. 315, 41 Pac. 1093, decided in 1895, where the plaintiff city attempted to limit the charges for the service rendered by the defendant

beyond its own territory, which the court held to be an unreasonable and unauthorized interference with the right of other municipalities and the territory intervening between them that received the service afforded by the particular municipal public utility system. In holding the attempt to so regulate the service void, the court said: "A municipal ordinance must consist with the general powers and purposes of the corporation; must harmonize with the general laws of the state, the municipal charter, and the principles of the common law. One of the limitations upon such ordinances is that they can have no extraterritorial force unless by express permission of the sovereign power. In the nature of things, this must be so unless intolerable confusion and evil is to result; and the constitution of the state, recognizing the necessity for such a restriction, has provided (article 11, section 11), that 'any county, city, etc., may make and enforce within its limits all such local, * * * and other regulations as are not in conflict with general laws.' Here was a road lying partly within the confines of at least three municipalities—Los Angeles, South Pasadena, and Pasadena. Conceding the right of plaintiff to impose a limitation on the charges to be made for passage between stations within its limits and stations elsewhere, then the other cities named have, or might have, the same right."

A municipality has no authority to install a water pipe beyond its own territory, in order to reach its supply for its waterworks system, without the consent of the authorities of such territory, secured either by a purchase or condemnation of the land or necessary property rights, as is indicated in the case of Bay City Plumbing & Heating Co. v. Lind, 235 Mich. 455, 209 N. W. 579, where the court said: "The city of Bay City was recently engaged in installing a new water system. It owned the necessary property on the shore of the bay. To reach that property it was obliged to traverse the township of Bangor with a water pipe. Plaintiffs were engaged in laying that water pipe for the city. * * * Defendants contend * * * that this act [C. L. 1915, § 3401, et seq.] gives Bay City the authority to purchase land rights, and to condemn the necessary property rights. The city used neither of these methods, and therefore, under article 8, section 28, of the Michigan Constitution, it was a trespasser when it attempted to use the property rights of the township of Bangor. * * * A municipal corporation must be included in the word 'corporation', as there used, especially when the municipality is engaged in public utility con-

struction outside of its own territory. If this were not so, a municipal corporation could sell its surplus power to a manufacturing plant in a neighboring village and erect its poles in that village contrary to the wishes of its inhabitants, and thereby deprive the neighbor of a 'reasonable control of its streets, alleys, and public places.' * * * When these sections of the constitution and statute are construed with reference to each other, our conclusion is that the city of Bay City had no right to install its water pipe in the township of Bangor without securing from that township its consent."

In the exercise of its general police power a municipality may enact a reasonable ordinance for the regulation of one-man street cars, although the general operation of street railways is under the regulation of the public utilities commission. This power is recognized as belonging to the municipality because it is a local traffic regulation which it may enact for the safety and benefit of its inhabitants, as is held in the case of *Connecticut Co. v. New Haven*, 103 Conn. 197, 130 Atl. 169, where the court said: "Under its general police power and under the sections of its charter, * * * which specifically confer upon New Haven the power of enacting police regulations over the use of its streets by street railways, we think the city of New Haven had the power in 1893 of enacting the police regulation contained in the so-called one-man car ordinance, provided it were reasonable. * * * The subject-matter of this ordinance clearly falls within the exclusive jurisdiction of the commission. * * * We conclude the Public Utility Act of 1911, now chapter 191 of General Statutes, shows, and particularly in section 3621, a legislative intent to place the exclusive jurisdiction over the operation of street railways, aside from mere local traffic regulations in the public utilities commission."

§ 505. **Power to grant perpetual franchise not implied.**—The early case of *Milhau v. Sharp*, 17 Barb. (N. Y.) 435, 9 How. Prac. 102,¹² decided in 1854, enunciated the principle which is of general application that the power which may be delegated to the municipality to regulate from time to time the rates to be charged by certain municipal public utilities in connection with the grant of such franchise privileges in the use of its streets does not include the power to surrender and absolutely barter away its control of this matter by the grant of a perpetual and irrevocable right of way to a particular municipal public utility,

¹² Affirmed in 7 Abb. Prac. 220, 28 Barb. 228.

for as the court said: "Instead of regulating the use of the street, the use itself, to the extent specified in the resolution, is granted to the associates of the Broadway Railroad. For what has been deemed an adequate consideration, the corporation has assumed to surrender a portion of their municipal authority, and has, in legal effect, agreed with the defendants that, so far as they may have occasion to use Broadway, for the purpose of constructing and operating their railroad, the right to regulate and control the use of that street shall not be exercised. That the powers of the corporation may be surrendered, I do not deny; but I think it can only be done by authority of the legislature."

That the power to grant such extended and material franchise rights without express statutory authority does not vest in the municipality by a mere delegation of the right to control its streets is decided by the court in the case of *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142, decided in 1900, as follows: "Surely, we can not say, contrary to the drift of all the law of the country, that the mere power to control streets and light the same carries with it by implication the enormous power to tie the hands of an important municipality for many years, or that such a power is indispensable or necessary to enable the municipality to carry out its legitimate functions."

The case of *Elizabeth City v. Banks*, 150 N. Car. 407, 64 S. E. 189, 22 L. R. A. (N. S.) 925, decided in 1909, further stated the general rule that authority must be specially delegated to the municipality before it can grant special franchise rights to municipal public utilities as follows: "In the absence of any express grant of power in the charter, it would be difficult if we adhere to the canons of construction of corporate charters to find it by implication. It will hardly be contended that the laying of gas pipes for the purpose of furnishing light, fuel, and power to the citizens by a private business enterprise is essential to, or implied in, the power to regulate and control the use of the streets. As we have seen, the courts have not found the power except as an express grant from the sovereign."

It necessarily follows that, where because of constitutional limitations, the state itself has not the power to grant a particular franchise right which is exclusive and perpetual in its terms, the municipality likewise has no such power, for as the court in the case of *Birmingham & Pratt Mines St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615, decided in 1885, said: "The exclusive right of the appellee to the privilege

claimed, in our opinion, can not be sustained. The general assembly would itself have no power under the constitution to make such a grant. A fortiori, a mere municipality would have no such power."

§ 506. Change of street grade requiring relocation of pipes valid.¹³—The proper exercise of the police power permits the municipality as well as the state, independently of any franchise grants or statutory authority that may be conferred either upon the public service corporation or the municipality, to protect the interests of the public in the reasonable use and enjoyment of streets and highways for which they were dedicated and in the interest of the public to conserve the public health and the general welfare and convenience of the people. Under the rule which is universally accepted, the municipality has not the power to abridge or surrender its right to perform its duties to the public, especially in maintaining its streets for the advantage of the public as a means of transportation and communication and the municipal officers can not bind their successors in the proper discharge of such duties because such powers are legislative and can not be abridged. The court in the case of *Columbus Gaslight & Coke Co. v. Columbus*, 50 Ohio St. 65, 33 N. E. 292, 19 L. R. A. 510, 40 Am. St. 648, decided in 1893, in upholding the right of the municipality to change the grade of its streets without bearing the expense thereby occasioned the plaintiff corporation in the relocation of its pipes, said: "It would follow from this that in prescribing regulations, or annexing conditions, by the city, to the exercise by a gas company of a right in a street to enjoy the same for this secondary use, the council has not the authority to cede away nor bargain away the right of the city to perform its public duties, especially as to a primary use of its streets, nor to abridge the capacity of its successors to discharge those duties, unless some express provision of statute is found to that effect and that is not claimed. * * * An ordinance to grant an exclusive right or a perpetual right to occupy a particular part of the street would be an attempt to bind succeeding councils as to their exercise of legislative power, and would, for reasons stated, be ineffectual. The grant by the city must be interpreted in the light of the right and duty of the city to regrade, whenever in its judgment the public interest demands; and whatever easement the gas company can receive, it must accept and enjoy in common with equivalent rights

¹³ This section (§ 410 of 2d edition) quoted in full in *Bluefield v. Public Service Comm.*, 94 W. Va. 334, 118 S. E. 542.

which have been or may be acquired by other public agencies—rights of a like secondary character; and all must give way to the paramount duty of the city to care for the streets, and keep them open, in repair, and convenient for the general public. This duty would be seriously interfered with if the city could not change the grade of its streets save upon the condition that it should make compensation to every gas company, and water company, and telephone company, and electric light company, and street railway company, for inconvenience and expense thereby occasioned. All such agencies must be held to take their grants from the city upon the condition, implied where not expressed, that the city reserves the full and unconditional power to make any reasonable change of grade or other improvement in its streets.”

Where the city did not grant the franchise, however, or have the power expressly conferred to require the relocation of public utility equipment so as to conform to new street grades the city is not the proper party to require such relocation for as decided in the case of *People v. Western New York &c. Traction Co.*, 214 N. Y. 526, 108 N. E. 847: “This proceeding was instituted to compel the defendant, a street railroad corporation, to remove its tracks from the side to the center of East State street, in the city of Olean, in accordance with a resolution of the common council of said city. When the defendant’s road was constructed the part of the street in question was outside the limits of the city, and in the town of Olean. The consent of the town highway commissioner, granted pursuant to the statute, now section 171 of the Railroad Law; Consol. Laws, ch. 49, required the construction of the railroad on the side of the highway ‘where it will not interfere seriously with ordinary traffic.’ Pursuant thereto the railroad was located on the south side of the highway. Proceedings having been taken to improve said street under section 137 of the Highway Law (Consol. Laws, ch. 25), the common council adopted the resolution which is the basis of this proceeding. A railroad derives its franchise from the state. The statute, now section 171 of the Railroad Law, pursuant to article 3, section 18, of the state Constitution, makes the exercise of such a franchise in the case of street railroads conditional upon the consent ‘of the local authorities having control of that portion of a street or highway upon which it is proposed to build or operate such railroad,’ etc. No doubt, the consent of the local authority may be withheld or granted on specified conditions, but, when given, the special franchise, so called,

becomes property protected by the constitution, and, except for conditions attached to the consent, subject to regulation only under the police power. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 225, 7 Am. St. 684; *Ingersoll v. Nassau Electric R. R. Co.*, 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236. No doubt, to promote the public convenience the legislature may compel the defendant to relocate its tracks. * * * However, the police power resides in the state legislature, and may be exercised by local bodies only to the extent that it has plainly been delegated. * * * Powers of local government and police regulation usually possessed by municipal corporations will be implied more readily than a delegation of the police power; e. g., to regulate the exercise of franchises by public service corporations. * * * Certainly then the power to compel a relocation of the tracks of a street railroad will not be implied from the general power to alter and improve streets. There is not a word in the charter of the city of Olean to suggest that the legislature intended to delegate the power now asserted, or even considered the matter. It does not appear in this case that the public convenience even will be promoted by changing the tracks to the center of the street."

To the same effect this power of control of cities over their streets is well defined in the case of *Omaha, L. & B. R. Co. v. Lincoln*, 97 Nebr. 122, 149 N. W. 319: "Of course, if the plaintiff constructs the paving between its rails as the law requires it will first lay a concrete foundation therefor, and so will not be damaged by substituting this foundation for the cinder foundation it now has. If the city can, in ordinary cases, only require a railway company to conform its tracks to grade by ordinance duly enacted, and if, after an ordinance is duly enacted, as in this case, fixing the grade and requiring the streets to be paved, a second ordinance is necessary to require the railway company to place its paving upon the grade, we have that second ordinance in this case, since the original franchise ordinance under which the plaintiff laid its tracks provides that the plaintiff shall conform its tracks to the grades then existing or to be established, and there is a general ordinance of the city requiring this to be done. It would seem that no further ordinance of the city could possibly be necessary for that purpose. * * * The city under the statutes has entire control of the streets. If the statute authorizing condemnation of a street by a railway company means anything more than to give it the means of having the pecuniary damage to the city and property owners fairly adjust-

ed when agreement is impossible, it can not, when considered with other statutes, or when considered in the light of the general policy of the state, be intended to allow a railway company to select at will the street or streets of a city upon which it will lay its tracks, or to give it any right in any street except subject to the control and regulation of the city, and subject to the equal right of the public in the use of the street. * * * We can not say from this evidence that the plan adopted is so clearly impossible as to require the courts to interfere with the discretion and judgment of the city authorities."

After quoting the text of this section with full approval, the court in defining the effect of the public utility law on the question of the city's control of its streets decided in the case of *Bluefield v. Public Service Comm.*, 94 W. Va. 334, 118 S. E. 542, that: "Under the charter creating the city of Bluefield and under the general laws that municipality has full power to open, close, pave, and protect its streets and pavements from damage by any person using the same. It is a part of its police powers which it can not contract away. The rule is well stated in *Pond on Public Utilities*, section 410. * * * We do not think the Public Service Commission Act has taken from the city of Bluefield any of its police power to properly maintain and protect its streets from damage or from interference with the public use and travel thereover. We do not think it was the intention of the legislature in creating the public service commission to give to it jurisdiction to protect the streets of a municipality from damage, and thus divide or abridge the police powers of the municipality in that regard."

As all franchise rights are granted subject to the reserved police power of the municipality to regulate the use of its streets in the interest of the public safety and convenience, which power can not be relinquished by contract, the municipality may make any reasonable change in the grade or improvement of its streets, to which a street railway company must conform its tracks, for as the court said in the case of *People v. Chicago City R. Co.*, 324 Ill. 618, 155 N. E. 781: "The license under which the railway company constructs, maintains, and operates its railroad was granted and accepted subject to a reserved police power on the part of the city to regulate the use and enjoyment by the railway company of the street in such manner as the public convenience or safety at any time might require. * * * The city is under no obligation to conform its treatment of its streets to the construction of the company's roadbed, but, on the contrary,

the company must conform the construction of its roadbed to such reasonable regulations as are made by the municipality in the reasonable exercise of its powers concerning the use, control, regulation, and improvement of its streets. * * * The power of the city to protect the public in the use of its streets can not be abrogated by ordinance or relinquished by contract. * * * All corporations thus occupying the streets take their grants from the city upon the condition that the city has reserved to it the full and unconditional power to make any reasonable change of grade or other improvement in its streets, as the public necessity and convenience demand."

This same court in a former case held that the municipality had the exclusive authority to grant franchises for the operation of street railways in its streets and to impose such terms as it saw fit which became binding on the street railway, when accepted, and obligated it at its own expense to grade, pave, and repair the streets between and along its tracks, including any necessary change or repair due to the installation of drainage and water pipes, for as the court said in the case of *Chicago City R. Co. v. Chicago*, 323 Ill. 246, 154 N. E. 112: "The city had the exclusive authority to grant permission for the construction, maintenance, and operation of street railways in the streets of the city, and in doing so could impose such terms as it saw fit. By its acceptance of the ordinance the appellant became bound by its terms. * * * The language of section fifteen required the company, at its own expense, to fill, grade, pave, and keep in repair that portion of the streets occupied by it and the duty was unlimited, except by the expression, 'as more specifically provided for in said Exhibit B.' Exhibit B made no such exception as the appellant claims in case the repairs were made necessary by the acts of the city. It is a legitimate use of the streets to lay sewers and water pipes in them. The city is expressly authorized to regulate openings in them for the laying of water mains and pipes and the building and repairing of sewers, tunnels, and drains."

In sustaining the power of the municipality to require street railways to pave their right-of-way according to the terms of their franchise, this same court in a later case indicated that this requirement supplanted a liability for a special assessment for such a purpose, in the case of *Springfield v. Gillespie*, 335 Ill. 388, 167 N. E. 61, where the court said: "An ordinance granting authority to maintain and operate a street railway in a public street, when accepted and acted upon, becomes a valid and binding con-

tract, which can not be revoked by either party; and, if the ordinance requires the street railway company to pave its right-of-way at the time and in the manner in which the remaining portion of the street is paved by the city, the requirement will be regarded as the equivalent of a special assessment on the company's right-of-way for paving the street and to preclude a further assessment for that purpose. * * * The company accepted and acted upon the ordinance, and it is bound to pave its right-of-way when directed to do so by the city. Hence the right-of-way was properly excluded from the assessment roll."

Municipal corporations may exercise a wide discretion in the improvement of their streets where a change of grade has been required for the safety and convenience of the public; although such a change may appear ill-advised, it will not be interfered with by the courts so long as it is not arbitrary and entirely unreasonable, for as the court said in the case of *Des Moines City R. Co. v. Des Moines*, 205 Iowa 495, 216 N. W. 284: "Cities and towns are given power by statute to 'establish, lay off, open, widen, straighten, narrow, vacate, extend, improve, and repair streets, highways, avenues, alleys, public grounds, wharves, landings and market places within their limits.' Sections 464, 465, and 527, Code of 1873. In the exercise of the power thus conferred, the councils thereof exercise a large discretion, and the right of injunction can seldom be invoked to prevent such exercise. * * * The proposal of appellee is to reduce the grade of Sixth Avenue and to widen the same for a distance of about four hundred feet between School Street and University Avenue. The maximum reduction is three feet eleven and one-half inches. It is contended by appellant that the grade as it now exists is far less than that of other streets extensively used for traffic in said city, and that a change therein will not contribute to the safety or convenience of the public. With whether the proposed change in the grade is a wise one or not, the court is not concerned. It is incidental to, and a part of, a plan to widen Sixth Avenue at the point designated, and this court can not say that it is so unreasonable and arbitrary as to be void. It is not enough that it may be ill-advised, and not required by the exigencies of travel. The power conferred upon the commission in the city of Des Moines is large, and courts will not undertake to limit or control its discretion in such matters. It is our conclusion that the ordinance is not void."

As all franchises are granted subject to the police power, public utilities are obliged to remove or relocate their equipment

at their own expense whenever public health or safety requires that this be done; and only where legislation expressly imposes the expense of such a change or removal on the taxpayers will the utility be relieved from bearing it. This principle and the reasoning on which it is based are clearly set out as follows in the case of *Transit Commission v. Long Island R. Co.*, 253 N. Y. 345, 171 N. E. 565, P. U. R. 1930D, 394, where the court said: "The gas company has received from the public authorities its franchise or privilege to lay and maintain its gas main under the surface of the public street. Without this grant from the people it has no rights in the highway. This privilege, or franchise, is at all times subject to the police power of the state; in other words, the company maintains its pipes subject to the obligation to remove them whenever the public health or safety require this to be done. Although authorized to lay its pipes in the public streets, the company takes the risk of their location and is bound to make such changes as the public convenience and security require, at its own cost and charge. * * * The aim and object of the Elimination Act, and the methods used to accomplish its purpose, indicate that there was no intention to relieve public service corporations having franchises in the highways from their ordinary obligations. The general rule is and always has been, as we have above stated, that these corporations must relocate their properties in the highway when public necessity requires. The grade crossings of steam railroads have created an urgent necessity to do something for the safety of the traveling public. Not for the benefit of the railroads, but for the benefit of the people of the state, these grade crossings must go, and, while the result may be slow in attainment, the work goes steadily on. * * * The reasonable construction of the Elimination Act under these circumstances is to assume that the people are not to be burdened with any heavier expense than necessity requires, and that to relieve the public service corporations, having franchises in the streets, of their common law liabilities and to pass them over to the taxpayer can only be accomplished by the express direction of the legislature. In the absence of any such legislation, the New York & Queens Gas Company must at its own expense remove and relocate its gas main at Bayside avenue, and permit the work of elimination, as planned, to proceed."

§ 507. Sewer systems paramount to public utility pipes.—That the power of the municipality to install a sewer system in the interest of its public health is paramount to the special fran-

chise rights of a municipal public utility, which was required to remove certain pipe lines in order to permit of the installation of the sewer system, is the effect of the decision in the case of *National Waterworks Co. v. Kansas, Missouri*, 28 Fed. 921, decided in 1886, where the court said: "Sewerage is a matter unquestionably affecting largely the public health, and no municipality can make a contract divesting or abridging its full control over such matters. * * * The contract between the plaintiff and the defendant must be interpreted in the light of this well-established rule; and, so interpreted, the plaintiff took its right to lay its pipes in the streets of the city subject to the paramount and inalienable right of the city to construct sewers therein whenever and wherever, in its judgment, the public interest demand. Laying its pipes subject to this right of the city, it has no cause of action if, in consequence of the exercise of this right, it is compelled to relay its pipes."

That the exercise of the police power by the municipality in the interest of the public health, although it interferes with the private rights of individuals or municipal public utilities, will be justified if reasonable and not arbitrary is the effect of the decision of the United States Supreme Court in the case of *New Orleans Gas Light Co. v. Drainage Commission of New Orleans*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. 471, decided in 1905, where the court said: "It is admitted that in the exercise of this power there has been no more interference with the property of the gas company than has been necessary to the carrying out of the drainage plan. There is no showing that the value of the property of the gas company has been depreciated, nor that it has suffered any deprivation further than the expense which was rendered necessary by the changing of the location of the pipes to accommodate the work of the drainage commission. The police power, in so far as its exercise is essential to the health of the community, it has been held can not be contracted away. * * * In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

§ 508. Arbitrary exercise of police power not sustained.—Where the sewer system can be installed along the side of the street equally well and at practically the same cost, thereby

avoiding the necessity of requiring the removal of tracks and other equipment of the municipal public utility, the municipality in the exercise of the police power is not justified in insisting on the sewer system being placed in the center of the street, for as the court said in the case of *Des Moines City R. Co. v. Des Moines*, 90 Iowa 770, 58 N. W. 906, 26 L. R. A. 767, decided in 1894: "The evidence shows clearly that the sewer can be placed outside of the line of the railway without impairing, in any respect, the efficiency of the sewer system, and that sanitary considerations do not require that it be placed in the center of the street. * * * The evidence shows that the expense of constructing the sewer at the side of the street need not be materially, if any, greater than to place it in the center. We are of the opinion that the reasons for placing it in the center of the street are not of sufficient importance to impose upon the plaintiff the burden of removing its track, and to expose the patrons of this line to the inconvenience and danger which would be caused by such a removal. In other words, we think the demand of the city is unreasonable."

§ 509. Municipality can not barter away right to exercise police power.—That the city can not bind itself by contract, however, not to act in the interest of the general public and for the public health is well expressed in the case of *Macon Consol. St. R. Co. v. Macon*, 112 Ga. 782, 38 S. E. 60, decided in 1901, where the court said: "This agreement is an attempt on the part of the mayor and council to tie their hands as well as those of their successors with respect to a matter of great public interest. It is, in effect, a contract on their part that they will not in the future, no matter how much the public convenience or safety may demand it, attempt to regulate the location of the tracks of this company in this street. We are clear that this can not be done. Municipal corporations 'may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.'"

The right to exercise the police power is a continuing one and may be invoked at any time that the public health or convenience requires it, and can not be contracted away by the municipality even for a valuable consideration, for as the court in the case of *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665, decided in 1892, said: "Thus, in express terms, the legislature conferred upon the corporate authorities of the city of Roanoke

the most ample powers to grade and otherwise improve its streets, from time to time, as in its judgment and discretion was required for the safety and convenience of the public. The powers thus delegated are continuing and inalienable. It is therefore undeniable that, though a city may have agreed for a valuable consideration to allow a company to lay gas or water pipes in its streets, yet if, in the exercise of its authority to lower the grade of and to remove obstructions from its streets, the pipes should become exposed, so as to obstruct the public in the safe and convenient passage along them, the municipal authorities may of right either require such company to remove, or they, by their servants, may remove, them as obstructions and nuisances."

The case of *State v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410, decided in 1890, furnishes an interesting distinction between the right of the municipality to exercise the police power over private individuals and corporations, for the reason that the corporation being a creature of the state sometimes has conferred upon it by its charter, rights not possessed by the individual which the municipality must respect, for as the court said: "It is indeed true that the power of police regulation by municipal corporations over corporations is restrained within narrower limits than its power over persons. This difference does not arise from any lack of power in the legislature to exert directly or to delegate to municipalities the power to exert the same control over each. It springs out of the circumstance that corporations, as the creatures of legislation, have often accompanying the grant of their franchises a grant of special powers and privileges, coupled with limitations upon the right of municipal interference. The municipal legislation can not by any regulation of its own abridge the privilege thus conferred, or infringe upon the limitations thus prescribed. This is so because the act of incorporation is a law of the state, and because any by-law which runs counter to any law, whether organic or legislative, is void. The power to regulate still exists, but in these instances the legislature itself chooses to directly exercise the power or to fix the limits within which it may be exercised by cities."

That the municipality is not bound by its agreement to pay the cost of removing or relocating the equipment of a municipal public utility in connection with the change in grade of its streets or the installation of its sewer system, because this expense must be borne by the municipal public utility itself, is expressed in the

case of *Anderson v. Fuller*, 51 Fla. 380, 41 So. 684, 6 L. R. A. (N. S.) 1026, 120 Am. St. 170, decided in 1906, where the court said: "The city of Tampa was, therefore, not authorized directly or indirectly to burden itself or its citizens with the cost of removing and replacing of the water pipes, gas pipes, telegraph, telephone, and electric light poles, drains, conduits, or railway tracks that might necessarily have been interfered with in laying its sewers in the streets."

Municipal contracts and franchises are construed in favor of the public and in the interest of the inhabitants of the municipality, and where a conveyance by an adjoining property owner of a right-of-way for a street railway company is to remain effective "so long as said railway with either single or double track, shall be maintained and operated thereon," and the city later becomes the owner of such street railway system, which it continued to operate, but, so far as the right-of-way above-mentioned, it only operated a spur track, the court held that this constituted sufficient compliance with the terms of the transfer to retain title in the municipality, although the only service furnished on the particular street or strip of ground transferred was its use as a spur track. This construction is made as follows in the case of *Burkheimer v. Seattle* (Wash.), 299 Pac. 381, where the court said: "The deed of conveyance, after making certain recitals showing the authority of the officers executing the instrument, continued as follows: * * * 'A right-of-way for the railway of said grantee thirty (30) feet in width, that is to say, fifteen (15) feet in width on each side of the center line of the railway track of said grantee, as now constructed and operated over and across the following property, to-wit: Lot No. 6 in Block No. 1, and across the southeasterly portion of Block No. 18, both in Porterfield's Addition to Seattle, and across the northerly and northwesterly portion of Block No. 4, in Smith & Burns Addition to Seattle so long as said railway with either single or double track, shall be maintained and operated thereon, but no longer and for no other purpose than the one above-mentioned. * * *' Later on, the city of Seattle succeeded to the interests of the Green Lake Electric Railway Company, and is itself now maintaining and operating the street railway line. * * * The city did not remove the rails on the old line track leading from the intersection of North Forty-Fifth street with Stone Way over and across Block 18, but now maintains and operates it as a spur track. The appellants, Burkheimer and wife, are the successors in interest of the Green

Lake Home Building & Guarantee Company to lots 9 and 10, having acquired the interests of that company in the lots by mesne conveyances. In this action, they seek to have the interest of the city in the lot forfeited and their title to the lots quieted against the claims of the city. * * * Turning to the instrument here in question, it will be observed that the words of grant contained therein do not restrict the grantor to the use of the property granted for its main line tracks. It speaks of the 'railway of said grantee' and grants to the grantee the use of the property granted 'so long as said railway * * * shall be maintained and operated thereon * * *'. The term 'said railway' is broad enough to include the entire plant of the grantee, whether it be its main line or whether it be spur tracks or side tracks used and operated in connection with its main line. It is not to be questioned, of course, that an entire abandonment of the property would work a forfeiture of the grant; but the city has not abandoned the property in fact. It still maintains and operates thereon, as a part of its railway system, a railway track connected with its main line. If there is an abandonment at all, therefore, it is an abandonment in law, and this we can not conclude."

CHAPTER 21

THE RIGHT TO FIX RATES

Section	Section
515. Property devoted to public use subject to public regulation and control.	528. Power to contract gives power to fix rates until revoked.
516. Control of state over its corporations.	529. Power to grant municipal franchise rights on conditions construed liberally.
517. Regulation of rates for municipal public utilities.	530. Individual inhabitant can enforce franchise rights.
518. Competition not sufficient regulation.	531. Municipal grant of monopoly rights may be conditioned on control.
519. Delegation of power of regulation must be clearly intended.	532. Acceptance of conditions imposed by city creates binding contract.
520. Power of municipal regulation governmental, continuous, and personal.	533. Service must be provided according to terms of contract.
521. Municipal regulation from control of its streets.	534. Failure of municipality to provide rate in franchise.
522. Control as condition of granting municipal consent or franchise.	535. Regulation of streets not authority to regulate rates during franchise.
523. Power of municipal regulation plenary and complete.	536. Power of municipality to regulate rates not provided in franchise — Police regulations.
524. Municipal ordinance fixing rate binding.	537. Power to contract and to regulate distinguished.
525. Rate regulation suspended by contract fixing rate.	538. Rates fixed by agreement of parties binding.
526. Municipal officers competent to fix rates when disinterested.	539. Police power.
527. Express contract for reasonable period fixing rates is valid.	540. Public utility commissions.

§ 515. **Property devoted to public use subject to public regulation and control.**—The rule of law is now universally accepted that when private property is devoted to a public use it is subject to public regulation and control. In recognition of this doctrine and as furnishing a forceful definition and a current application of it to modern industrial conditions for the purpose of controlling public service corporations, providing any public utility service, the leading and most important case is that of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. Under this decision property is clothed with a public interest and devoted to a public use when used in a manner to make it of public consequence,

and to affect the entire community, so that when one devotes property to a use in which the public has an interest, he virtually grants to the public an interest in that use, and submits it to public regulation and control for the common good to the extent of the interest so granted.

§ 516. **Control of state over its corporations.**—It is evident that when the state in the exercise of its sovereign power grants a charter, conferring the privilege of existing and operating as a legal entity upon the united interests of a number of individuals and constituting them a body corporate, such a grant of special rights and privileges can be made subject to such conditions and regulations as the state may see fit to impose within constitutional limitations. Being the creature of statutory origin, the corporation possesses only the powers given by such origin upon the conditions stipulated by the state; and where the power to alter, amend or repeal is reserved in connection with the granting of the charter, such power may be exercised at any time thereafter without impairing the obligation of contracts, prohibited by our federal Constitution, because the contract resulting from the acceptance of the franchise is made subject to such modification or rescission.

While the state has the power to fix rates itself or through such agencies as its public utilities commission or its municipalities, the courts have no such power; although they will set aside a rate which is unreasonable, either because it is unfair to the consumers or confiscatory to the public utility, for as the court said in the case of *Southern Bell Tel. & T. Co. v. Railroad Comm. of South Carolina*, 5 Fed. (2d) 77, P. U. R. 1926A, 6: "The courts have no power to make rates. The legislature, in order to guard the public from exorbitant rates on the part of public utilities, has the power either by legislative act, or acting through other agencies, such as the railroad commission of this state, to fix reasonable rates; but the legislature can not fix rates so unreasonably low as to amount to confiscation."

The federal court in passing on its authority in such matters, indicates that it will not permit a conflict of authority between state and federal courts to arise, but that it will protect its own jurisdiction by injunction, if necessary, for as the court said in the case of *Pacific Tel. & T. Co. v. Agnew*, 5 Fed. (2d) 221, P. U. R. 1926A, 187: "After referring to the familiar and long-established practice of the use of the writ of injunction by federal courts first acquiring jurisdiction over the parties and the subject-matter of a suit, for the purpose of preserving that juris-

diction until the object of the suit is accomplished and 'complete justice done between the parties,' the court said: 'So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that section 265 of the Judicial Code Rev. Stats., section 720, Act of March 2, 1793, c. 22, 1 Stat. 334, has repeatedly been held not applicable to such an injunction.' We think the principle there applied is controlling in the present matter, and that to protect its jurisdiction the federal court should issue the order prayed for. * * * The decree dismissing the suit is reversed, and the cause is remanded, with directions to grant an order restraining Agnew from further prosecuting the action brought by him in the justice's court at Seattle, and from further interfering with the possession and control exercised over certain property now in the possession and control of the United States district court."

In deciding a case under the laws of the state of New York, the federal court sustained the principle that a rate fixed even by the state will be set aside by the court, if unreasonable or confiscatory in its effect, for as the court said in the case of *Brooklyn Union Gas Co. v. Prendergast*, 7 Fed. (2d) 628, P. U. R. 1926A, 412: "The regulation of rates to be charged by a public utility is concededly an exercise of the police power of the state, 'customary in England from time immemorial, and in this country from its first colonization.' *Munn v. People of Illinois*, 94 U. S. 125, 24 L. ed. 77. * * * It is equally authoritative that 'a legislature can not bargain away the police power, nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health, and morals of all who may be within their jurisdiction.' *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, 31 Sup. Ct. 534, 55 L. ed. 789. It follows that 'regulations regarding rates which municipalities may impose in granting licenses or permission to use its streets by public service corporations can not be said to form contracts beyond the inherent police power of the legislature to modify for the public welfare.' These regulations therefore 'may be modified without impairing the obligation of a contract within the provisions of the constitution.' *People ex rel. Village of South Glens Falls v. Public Service Commission*, 225 N. Y. 216, 121 N. E. 777. * * * Fully recognizing the reluctance of courts to declare a statute of this character confiscatory until experimentation has first been had (*Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, 121 N. E. 772; *Kings County Lighting Co. v. Nixon*

et al. (D. C.), 268 Fed. 143), yet the Supreme Court, in the language which is quoted from *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, recognizes that an exceptional situation may possibly exist. I think the plaintiff has brought itself within the rule."

§ 517. Regulation of rates for municipal public utilities.—As stated by the Supreme Court of Indiana in the case of *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201, "The power of a state legislature to prescribe the maximum charges which a telephone company may make for services rendered, facilities afforded, or articles of property furnished for use in its business, is plenary and complete." Indeed, it is settled beyond question that, in the absence of any express constitutional reservation, such corporations as furnish municipal public utilities are so affected by a public use as to be subject to legislative regulation and control, within constitutional limitations, which clearly and necessarily include the right to fix or regulate the rates which may be charged for their services.¹

§ 518. Competition not sufficient regulation.—While holding that competition as an agency of control and regulation has great value in securing the public advantage and conserving the public interests in those cases where municipal public utilities are operated by private capital, the courts have at the same time felt that it is unwise to depend upon this means of control alone. They have therefore endeavored to secure to municipal corporations the right to regulate and control the service rendered at the hands of private capital where the exercise of such a right would be consistent with the private property and contract rights guarantied by the constitution and with the general principles of the laws defining and regulating the powers of municipal corporations.

§ 519. Delegation of power of regulation must be clearly intended.²—The power of the state to regulate municipal public utilities, which includes the power to fix and control the rates

¹ *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418, mod. in 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. 888; *Chicago Union Trac. Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; *Ratcliff v. Wichita Union Stock*

Yards Co., 74 Kans. 1, 86 Pac. 150, 6 L. R. A. (N. S.) 834, 118 Am. St. 298, 10 Ann. Cas. 1016; *Zanesville v. Zanesville Gas Light Co.*, 47 Ohio St. 1, 23 N. E. 55.

² This section of third edition cited in *Logansport v. Public Service Comm. (Ind.)*, 177 N. E. 249, P. U. R. 1931E, 179.

that they may charge for their service, however, is a sovereign power which our courts hold can be delegated to municipal corporations only in express terms or by clear or necessary implication. While the legislature has the right to fix the price at which gas, water, electric lights or any other municipal public utility service shall be supplied by one who enjoys the special privilege of providing such service by reason of the grant of special franchise rights to that effect, the courts will not presume that such a right is vested in the municipality unless it has been granted by the legislature expressly or by clear implication. The right, however, may be delegated by the state to municipalities or other agencies or commissions in the absence of a constitutional limitation to that effect except as to vested interests and valid outstanding contract rights.

The surrender of the power to regulate and fix rates is never implied, and, in the absence of express authority, a schedule of rates is subject to regulation by the state under a franchise to erect a toll bridge, for as the court said in the case of *Lorenz v. Stearns* (N. H.), 161 Atl. 205: "The acceptance of these privileges would impose certain obligations upon the company. Undertaking in this way 'a sort of public office' (*McDuffee v. Railroad*, 52 N. H. 430, 448, 13 Am. Rep. 72), it would be bound to serve all and at equal and reasonable rates. On the other side the state would have the power to supervise the rates, and to keep them within the limits of reason. The claim made here is that this public duty to serve for reasonable compensation, and the correlative governmental right to compel such service, were abandoned by the legislature. The mere statement of the situation which is claimed to have been created, discloses the reason for the uniform holding that no such surrender by the legislature will be implied. Its existence must be established beyond question. It must be certain to every intent, and a reasonable doubt is sufficient to defeat it. This universal rule has been fully indorsed in this state. *Dow v. Railroad*, 67 N. H. 1, 48, 36 Atl. 510. * * * There is nothing in the language used by the legislature in this instance which in any way declares that the schedule of tolls is intended to be perpetual. The sole ground upon which it is claimed to be so is that a grant of property, or of a right, as to build the bridge or to take tolls, would be understood in that way. But because this is the reasonable and natural interpretation of a conceded grant of property or of rights which are not in derogation of government, it by no means follows that the same thought is expressed when what is said is

open to dual interpretations, one of which expresses the exercise of regulatory power while the other would declare an agreement to abdicate that governmental function. The choice then to be made is between grant and regulation. In this aspect of the case it is not a question of the extent and binding character of a granted right, but whether there is any grant at all. The argument from ordinary grants begs the question. Starting with the assertion that there is a grant of property, it assumed the vital issue.

"The state having full regulatory power says to the utility, 'You may make certain charges.' It is going a long way to aver that such a provision is perpetual, and an abdication of future power to regulate. Without the claimed grant, the company would have had the right to charge and collect all reasonable tolls. Any subsequent change of rate by the state would be subject to that limitation. The effect of the allowance of the claim here made would be to protect the company in the extortion of unreasonable charges. In view of these considerations it is evident that there is no proof beyond a reasonable doubt that the mere provision that the company 'may demand, take and receive * * * tolls according to the following schedule' was a legislative grant of a perpetual right to continue such collection, without regard to the question of future reasonableness. * * * Again, it is argued that the state could protect the public from extortionate rates by chartering a competing bridge. The economic waste involved in such a proceeding is manifest. The net result would be that the public would be called upon to support two bridges, when only one was needed. It is not thought that such a remedy would so appeal to the legislators as to induce them to surrender the direct and efficient remedy which regulation of charges affords. If the foregoing view of the nature of the provision fixing the rates for tolls is correct, there is as matter of course no question of the right of the state to make reasonable changes therein. This appears to be conceded. * * * It is evident that the legislation of 1891 was designed to remove any doubts as to legislative power to amend or repeal corporate franchises. It makes them in terms subject to that infirmity. * * * If the provision as to tolls was to be regarded as anything more than a determination of what tolls were presently reasonable, the alternative would be that it was the grant of a franchise, plainly repealable under the specific reservation contained in the general law. * * *

"The construction contended for by the state leads to reason-

able results, just to every one. That asserted by the defendant clothes the company with power to mulct the public, in the exercise of a public franchise. This consideration alone would be a sufficient reason for adopting the position taken by the state. * * * The anomaly in the holding in the Dartmouth College case that a grant of a charter is a contract has a marked tendency to obscure the true issue in a case like the present. There is a tendency to look only to the granting feature of the legislative act, to treat that as the whole transaction, and to overlook the provision in the general law that all such so-called contracts are now subject to cancelation at the will of the state. If there is a contract, the reservation is as much a part of it as the grant. The two are not separate and independent acts of the state but inseparable parts of one transaction. * * * The conclusion arrived at is that the provision in the Act of 1901 was a mere regulation of the tolls to be charged, and that if it could be construed as a grant of right it was a franchise, repealable under the reserved power of the state. It was not an irrepealable contract entered into on behalf of the state. * * * As to legislative dealings directly with the corporation, as by granting a charter, it has been determined that language granting authority to take certain tolls 'can not properly be construed as a promise or pledge that the limitation as to rates may not be altered at any time when, in the judgment of the legislature, it may be proper so to do.' *Stanislaus County v. Company*, 192 U. S. 201, 207, 24 Sup. Ct. 241, 243, 48 L. ed. 406. Upon the final proposition upon this branch of the case—the reserved right of repeal—the case last cited appears to be decisive upon the questions of violation of rights secured by the federal Constitution. It was there held in terms that if the grant of rates were to be held to be a contract binding upon the state, still the rates could be changed under the reserved power. * * * There is no reasonable doubt that the legislative purpose was to give the commission full control over the rates to be charged, save in a few specifically excepted instances, where power to increase certain statutory rates was withheld. Subject to these exceptions, the commission was clothed with the state's power to act. The statute has heretofore been construed to have this effect. It superseded a provision in a charter fixing a schedule of rates, with a reserved right of alteration by the court. *Proprietors of Cornish Bridge v. Fitts*, 79 N. H. 253, 107 Atl. 626."

§ 520. **Power of municipal regulation governmental, continuous, and personal.**³—The power of regulating rates is public and governmental in its nature, and in its operation and effect is intended to redound to the benefit and advantage of the municipality and its inhabitants who receive the municipal public utility service; and the duty of regulating the service and fixing the rates when delegated to the municipality is personal and fiduciary in its nature so that it can not be surrendered or bartered away by a transfer to another or by a contract suspending its exercise for an unnecessary or an unreasonable period. Indeed, the power is a continuing one and is not exhausted by its exercise, although a certain rate may be fixed by contract or in the franchise for a reasonable period which would constitute the established rate for such period; and unless, or until, a rate is prescribed by the state or its agency, the municipality or state commission to which this power may have been delegated, the municipal public utility may fix its own rates if reasonable for its service.

§ 521. **Municipal regulation from control of its streets.**⁴—Where the state has not delegated its right to regulate the rates for municipal public utility service to the municipality, but has conferred upon it full power of control over its streets and authority permitting it to provide for municipal public utility service for itself and its inhabitants, it has been decided in a number of cases of well-recognized authority that, in connection with the granting of the special privilege to install and operate a plant providing municipal public utility service in its streets, the municipality has the power to fix and control the rates by making this a specification of the contract in which it grants to the municipal public utility the special privilege of using the streets and furnishing service to the municipality and its inhabitants, which will obtain until otherwise regulated by the state. When the municipality has conferred upon it the power to grant the use of its streets on such terms and conditions as it might impose, it is only reasonable to hold, as a number of courts have decided, that it was the intention of the legislature to confer upon the municipality the necessary power to protect its interest

³ This section (§ 419 of 2d edition) cited in *Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146, 166 N. W. 998.

This section of third edition cited in *Logansport v. Public Service*

Comm. (Ind.), 177 N. E. 249, P. U. R. 1931E, 179.

⁴ This section (§ 420 of 2d edition) cited in *State v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799.

and to conserve the rights of its inhabitants at least for a reasonable period.

§ 522. Control as condition of granting municipal consent or franchise.—In regulating the service to be provided by the municipal public utility and the rates to be charged for it, it is of the utmost importance to the public and to the consumer of the service that the necessary provisions be made to secure adequate service at reasonable rates as a condition of the consent granted by the municipality to the use of its streets and to the providing by the municipal public utility of its service. So that the city has ample power to regulate the service and control the rates of municipal public utilities in its own interest and that of its inhabitants either by making the necessary provisions for doing so in connection with the granting of its franchise as such under the express authority delegated to it by the state to fix rates and control the service to be furnished or, if there is no express authority delegated to it by the state to do this, the municipality may make such provisions as are necessary to regulate the service and fix the rates by provisions to that effect in the contract giving its consent to the municipal public utility to use its streets and to supply its service within the municipality. Having granted the franchise in the one instance or made these stipulations, conditions to the giving of its consent to the use of its streets in the other case, and the municipal public utility corporation having accepted the franchise or agreed to the conditions and having installed its plant and begun to furnish its service, the municipality has thereby fixed the rates or reserved to itself the power to control them and to regulate the service of any particular municipal public utility which control until the state itself acts.

§ 523. Power of municipal regulation plenary and complete.—That the municipality, acting under authority expressly or by clear intention conferred upon it by the state to regulate and control the service of municipal public utilities and the rates to be charged for it, has the power and the responsibility of protecting itself and its inhabitants by providing for adequate service at reasonable rates in connection with its grant of the special franchise by virtue of which the municipal public utility acquires the right to install its system in the streets of the municipality and to supply its service is the generally accepted

rule as stated and illustrated in the following leading cases on this subject.⁵

⁵ *United States*. Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48; *New Orleans Gas Light Co. v. Louisiana Light & Co. Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 273; *San Diego Land & Co. v. National City, California*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804; *Los Angeles, California v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. 736; *Detroit, Michigan v. Detroit Citizens St. R. Co.*, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. 410; *Knoxville Water Co. v. Knoxville, Tennessee*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. 531; *Cleveland, Ohio v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. 756; *Blair v. Chicago, Illinois*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427; *Minneapolis, Minnesota v. Minneapolis St. R. Co.*, 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. 118; *Murray v. Poocatello, Idaho*, 226 U. S. 318, 57 L. ed. 239, 33 Sup. Ct. 107; *Wyandotte County Gas Co. v. State of Kansas*, 231 U. S. 622, 58 L. ed. 404, 34 Sup. Ct. 226; *Van Dyke v. Geary*, 244 U. S. 39, 61 L. ed. 973, 37 Sup. Ct. 483, P. U. R. 1917E, 539; *Dakota Central Tel. Co. v. State of South Dakota*, 250 U. S. 1631, 63 L. ed. 910, 39 Sup. Ct. 507, 4 A. L. R. 1623; *Los Angeles, California v. Los Angeles Gas & Co. Corp.*, 251 U. S. 232, 64 L. ed. 121, 40 Sup. Ct. 76; *Muscatine Lighting Co. v. Muscatine, Iowa*, 255 U. S. 539, 65 L. ed. 764, 41 Sup. Ct. 400; *San Antonio, Texas v. San Antonio Public Service Co.*, 255 U. S. 547, 65 L. ed. 777, 41 Sup. Ct. 428; *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 66 L. ed. 538, 42 Sup. Ct. 264, P. U. R. 1922B, 752; *Wichita R. & Light Co. v. Public Utilities Comm. of Kansas*, 260 U. S. 48, 67 L. ed. 124, 43 Sup. Ct. 51, P. U. R. 1923B, 300; *Arkansas Nat. Gas Co. v. Arkansas Railroad Comm.*, 261 U. S. 379, 67 L. ed. 705, 43 Sup. Ct. 387, P. U. R. 1923C, 714; *Bluefield Water Works*

& Co. v. Public Service Comm., 262 U. S. 679, 67 L. ed. 1176, 43 Sup. Ct. 675; *St. Cloud Public Service Co. v. St. Cloud, Minnesota*, 265 U. S. 352, 68 L. ed. 1050, 44 Sup. Ct. 492; *United States v. Hubbard, Ohio*, 266 U. S. 474, 69 L. ed. 389, 45 Sup. Ct. 160; *Fort Smith Spelter Co. v. Clear Creek Oil & Co.*, 267 U. S. 231, 69 L. ed. 588, 45 Sup. Ct. 263; *Banton v. Belt Line R. Corp.*, 268 U. S. 413, 69 L. ed. 1020, 45 Sup. Ct. 534, P. U. R. 1926A, 317; *Henderson Water Co. v. Corporation Comm. of North Carolina*, 269 U. S. 278, 70 L. ed. 272, 46 Sup. Ct. 112, P. U. R. 1926B, 666; *Peoples Nat. Gas Co. v. Public Service Comm.*, 270 U. S. 550, 70 L. ed. 726, 46 Sup. Ct. 371, P. U. R. 1926D, 187; *Smith v. Illinois Bell Tel. Co.*, 270 U. S. 587, 70 L. ed. 747, 46 Sup. Ct. 408, P. U. R. 1926C, 754; *Railroad & Warehouse Comm. v. Duluth St. R. Co.*, 273 U. S. 625, 71 L. ed. 807, 47 Sup. Ct. 489; *Denney v. Home Tel. & T. Co.*, 276 U. S. 97, 72 L. ed. 483, 48 Sup. Ct. 223; *Railroad Commission of Los Angeles v. Los Angeles R. Corp.*, 280 U. S. 145, 74 L. ed. 234, 50 Sup. Ct. 71; *Western Distributing Co. v. Public Service Comm.*, — U. S. —, 76 L. ed. 655 (Adv. Sh.), 52 Sup. Ct. 283, P. U. R. 1932B, 236; *Champlin Ref. Co. v. Corporation Comm. of Oklahoma*, — U. S. —, 76 L. ed. 725 (Adv. Sh.), — Sup. Ct. —.

Federal. Los Angeles City Water Co. v. Los Angeles, California, 88 Fed. 720; *Cleveland City R. Co. v. Cleveland, Ohio*, 94 Fed. 385; *Mills v. Chicago, Illinois*, 127 Fed. 731; *Omaha Water Co. v. Omaha, Nebraska*, 147 Fed. 1, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614, appeal dis. in 207 U. S. 584, 52 L. ed. 351, 28 Sup. Ct. 262; *Portland R. Light & Co. v. Portland, Oregon*, 201 Fed. 119; *Ft. Smith Light & Traction Co. v. Ft. Smith, Arkansas*, 202 Fed. 581; *Portland R., Light & Co. v. Portland, Oregon*, 210 Fed. 667; *Birmingham Water Works Co. v. Bir-*

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716, *affd.* in 160 App. Div. 914, 145 N. Y. S. 1117; Bronx Gas & Elec. Co. v. Public Service Comm., 190 App. Div. 13, 180 N. Y. S. 38; Bronx Gas & Elec. Co. v. Public Service Comm., 108 Misc. 204, 178 N. Y. S. 218, *mod.* in 195 App. Div. 931, 186 N. Y. S. 935, P. U. R. 1920A, 517; New York Interurban Water Co. v. Mt. Vernon, 110 Misc. 281, 180 N. Y. S. 304, P. U. R. 1920D, 515; Morrell v. Brooklyn Borough Gas Co., 113 Misc. 72, 184 N. Y. S. 656, P. U. R. 1922D, 310, *affd.* in 231 N. Y. 405, 132 N. E. 130.

North Carolina. Piedmont Power &c. Co. v. L. Banks Holt Mfg. Co., 183 N. Car. 327, 111 S. E. 623; Corporation Commission v. Henderson Water Co., 190 N. Car. 70, 128 S. E. 465.

North Dakota. Western Elec. Co. v. Jamestown, 47 N. Dak. 157, 181 N. W. 363; Chrysler Light &c. Co. v. Belfield, 58 N. Dak. 33, 224 N. W. 871, P. U. R. 1929E, 426.

Ohio. Zanesville v. Zanesville Gas Light Co., 47 Ohio St. 1, 23 N. E. 55; Zanesville v. Zanesville Tel. & T. Co., 64 Ohio 67, 59 N. E. 781, 52 L. R. A. 150, 83 Am. St. 725; Valley Tel. Co. v. Public Utilities Comm., 92 Ohio St. 390, 110 N. E. 958; Newark Nat. Gas &c. Co. v. Newark, 92 Ohio St. 393, 111 N. E. 150, *affd.* in 242 U. S. 405, 61 L. ed. 393, 37 Sup. Ct. 156, Ann. Cas. 1917B, 1025, P. U. R. 1916F, 1033; Kent Water & Light Co. v. Public Utilities Comm., 97 Ohio St. 321, 119 N. E. 731, P. U. R. 1918E, 711; Washington v. Public Utilities Comm., 99 Ohio St. 70, 124 N. E. 46, P. U. R. 1919F, 365; Cleveland v. Public Utilities Comm., 100 Ohio St. 121, 125 N. E. 864, P. U. R. 1920C, 713; Columbus v. Public Utilities Comm., 103 Ohio St. 79, 133 N. E. 800; Cincinnati v. Public Utilities Comm., 105 Ohio St. 181, 137 N. E. 36, P. U. R. 1923B, 755; Cleveland & Eastern Trac. Co. v. Public Utilities Comm., 106 Ohio St. 210, 140 N. E. 139, P. U. R. 1923D, 853; Ohio Bell Tel. Co. v. Public Utilities Comm., 106 Ohio St. 266, 139 N. E. 857, P. U. R. 1924D,

179; Lima v. Public Utilities Comm., 106 Ohio St. 379, 140 N. E. 147, P. U. R. 1923E, 577; Cincinnati & Suburban Bell Tel. Co. v. Public Utilities Comm., 107 Ohio St. 370, 140 N. E. 86, P. U. R. 1924A, 739; Hardin-Wyandot Lighting Co. v. Public Utilities Comm., 108 Ohio St. 207, 140 N. E. 779, P. U. R. 1924A, 122; Lindsey v. Public Utilities Comm., 111 Ohio St. 6, 144 N. E. 729; Columbus, Delaware &c. Elec. Co. v. Public Utilities Comm., 119 Ohio St. 282, 163 N. E. 914, P. U. R. 1929B, 519; Wheeling Trac. Co. v. Public Utilities Comm., 119 Ohio St. 481, 164 N. E. 523; Greenville v. Public Utilities Comm., 124 Ohio St. 431, 179 N. E. 131, P. U. R. 1932B, 273; Parks v. Cleveland R. Co., 124 Ohio St. 79, 177 N. E. 28, P. U. R. 1931E, 321; Columbus v. Ohio State Tel. Co., 13 Ohio App. 232, 29 C. D. (39 C. R.) 297, 28 O. C. A. 102, *later decision*, Columbus v. Public Utilities Comm., 103 Ohio St. 79, 133 N. E. 800; Universal Machine Co. v. Ohio Northern Public Service Co., 13 Ohio App. 271, 32 O. C. A. 525, *motion to certify overruled* in 65 Bull. 94, 17 O. L. R. 475.

Oklahoma. Shawnee Gas &c. Co. v. Corporation Commission, 35 Okla. 454, 130 Pac. 127; Pioneer Tel. & T. Co. v. State, 40 Okla. 417, 138 Pac. 1033; Pawhuska v. Pawhuska Oil & Gas Co., 64 Okla. 214, 166 Pac. 1058, P. U. R. 1917F, 226, *appeal dis.* in 250 U. S. 394, 63 L. ed. 1054, 39 Sup. Ct. 526, P. U. R. 1919E, 178; Bartlesville v. Corporation Commission, 82 Okla. 160, 199 Pac. 396, P. U. R. 1921E, 509; Southern Oil Corp. v. Yale Nat. Gas Co., 89 Okla. 121, 214 Pac. 131, P. U. R. 1923E, 418; Okmulgee Gas Co. v. Corporation Commission, 95 Okla. 213, 220 Pac. 28, P. U. R. 1924B, 249; Southern Oklahoma Power Co. v. Corporation Commission, 96 Okla. 53, 220 Pac. 370, P. U. R. 1924B, 64; McAlester Gas &c. Co. v. Corporation Commission, 102 Okla. 118, 227 Pac. 83; Huffaker v. Fairfax, 115 Okla. 73, 242 Pac. 254; Eagle-Picher Lead Co. v. Henryetta Gas Co., 112 Okla.

65, 239 Pac. 890, P. U. R. 1926A, 659; Mullendore Gas Co. v. Stillwater, 120 Okla. 140, 250 Pac. 895, P. U. R. 1927C, 49; Western Oklahoma Gas &c. Co. v. Duncan, 120 Okla. 206, 251 Pac. 37, P. U. R. 1927C, 277; Kansas, Oklahoma, &c. R. Co. v. State, 127 Okla. 240, 260 Pac. 468, P. U. R. 1928A, 825; American Indian Oil &c. Co. v. Geo. F. Collins & Co. (Okla.), 9 Pac. (2d) 438.

Oregon. Woodburn v. Public Service Comm., 82 Ore. 114, 161 Pac. 391, L. R. A. 1917C, 98, P. U. R. 1917B, 967; Portland v. Public Service Comm., 89 Ore. 325, 173 Pac. 1178, P. U. R. 1919A, 127.

Pennsylvania. Turtle Creek v. Pennsylvania Water Co., 243 Pa. 401, 90 Atl. 194; Turtle Creek v. Pennsylvania Water Co., 243 Pa. 415, 90 Atl. 199; Bellevue v. Ohio Valley Water Co., 245 Pa. 114, 91 Atl. 236; York Water Co. v. York, 250 Pa. 115, 95 Atl. 396; Perry County Tel. & T. Co. v. Public Service Comm., 265 Pa. 274, 108 Atl. 659; Suburban Water Co. v. Oakmont, 268 Pa. 243, 110 Atl. 778, P. U. R. 1920F, 810; Erie v. Public Service Comm., 278 Pa. 512, 123 Atl. 471, P. U. R. 1924D, 89; White Haven v. Public Service Comm., 278 Pa. 420, 123 Atl. 772; Westerhoff Bros. Co. v. Ephrata, 283 Pa. 71, 128 Atl. 656; Springfield Consol. Water Co. v. Philadelphia, 285 Pa. 172, 131 Atl. 716, P. U. R. 1926C, 321.

Rhode Island. East Providence Water Co. v. Public Utilities Comm., 46 R. I. 458, 128 Atl. 556.

South Carolina. Charleston Consol. R. &c. Co. v. Charleston, 92 S. Car. 127, 75 S. E. 390.

South Dakota. Wagner v. South Dakota Light &c. Co., 46 S. Dak. 389, 193 N. W. 129, P. U. R. 1923E, 97; Haines v. Rapid City (S. Dak.), 238 N. W. 145.

Tennessee. Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888, affd. in 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. 531; Lewis v. Nashville Gas &c. Co., 162 Tenn. 268, 40 S. W. (2d) 409;

Williams v. Southern Bell Tel. & T. Co. (Tenn.), 47 S. W. (2d) 758.

Texas. Southwestern Tel. & T. Co. v. State, 109 Tex. 337, 207 S. W. 308, P. U. R. 1919C, 56; Geller v. Dallas R. Co., 114 Tex. 484, 271 S. W. 1106; Amarillo Oil Co. v. Ranch Creek Oil Co. (Tex. Civ. App.), 271 S. W. 145; Community Nat. Gas Co. v. Natural Gas Co. (Tex. Civ. App.), 34 S. W. (2d) 900, P. U. R. 1931C, 186; Ball v. Texarkana Water Corp. (Tex. Civ. App.), 127 S. W. 1068; Athens Tel. Co. v. Athens (Tex. Civ. App.), 182 S. W. 42, P. U. R. 1916D, 796; Amarillo Gas Co. v. Amarillo (Tex. Civ. App.), 208 S. W. 239; Uvalde v. Uvalde Elec. &c. Co. (Tex. Civ. App.), 235 S. W. 625, P. U. R. 1922E, 376, affd. in (Tex. Com. App.), 250 S. W. 140; American Rio Grande Land &c. Co. v. Karle (Tex. Civ. App.), 237 S. W. 358; Dallas Power &c. Co. v. Carrington (Tex. Civ. App.), 245 S. W. 1046, P. U. R. 1923C, 137; South Texas Public Service Co. v. John (Tex. Civ. App.), 7 S. W. (2d) 942; Tillery v. McLean (Tex. Civ. App.), 46 S. W. (2d) 1028.

Utah. Brummitt v. Ogden Water Works Co., 33 Utah 289, 93 Pac. 828; Murray City v. Utah Light &c. Co., 56 Utah 437, 191 Pac. 421; St. George v. Public Utilities Comm., 62 Utah 453, 220 Pac. 720, P. U. R. 1924B, 550; Jeremy Fuel & Grain Co. v. Public Utilities Comm., 63 Utah 392, 226 Pac. 456, P. U. R. 1924D, 184; Utah-Idaho Central R. Co. v. Public Utilities Comm., 64 Utah 54, 227 Pac. 1025; Logan City v. Public Utilities Comm., 72 Utah 536, 271 Pac. 961, P. U. R. 1929A, 378.

Vermont. Barre v. Barre & M. Trac. &c. Co., 88 Vt. 304, 92 Atl. 237; Jones v. Montpelier &c. Light Power Co., 96 Vt. 397, 120 Atl. 103, P. U. R. 1923C, 806.

Virginia. Virginia Western Power Co. v. Commonwealth, 125 Va. 469, 99 S. E. 723, 9 A. L. R. 1148, P. U. R. 1919E, 766, cert. denied in 251 U. S. 557, 64 L. ed. 413, 40 Sup. Ct. 179; Clifton Forge v. Virginia-

§ 524. **Municipal ordinance fixing rate binding.**—In the case of *Cleveland, Ohio v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. 756, decided in 1904, under the statutory authority conferred upon the plaintiff city to contract for street railway service, the court, in holding that the municipality had the power to fix the rate for such service by ordinance which on acceptance by the municipal public utility became a contract, said: "In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time."

Western Power Co., 129 Va. 377, 106 S. E. 400, P. U. R. 1921D, 57; *Appalachian Power Co. v. Pulaski*, 130 Va. 612, 108 S. E. 885; *Victoria v. Victoria Ice, Light & Co.*, 134 Va. 134, 114 S. E. 92, 28 A. L. R. 562, P. U. R. 1923A, 465; *Roanoke Water Works Co. v. Commonwealth*, 137 Va. 348, 119 S. E. 268; *Richmond v. Virginia R. & Power Co.*, 141 Va. 69, 126 S. E. 353; *Chesapeake & Potomac Tel. Co. v. Commonwealth*, 147 Va. 43, 136 S. E. 575, P. U. R. 1927B, 484; *Blackwood Coal & Co. v. Old Dominion Power Co.*, 151 Va. 52, 144 S. E. 439, P. U. R. 1929A, 320.

Washington. Tacoma Gas & Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655; *Raymond Lbr. Co. v. Raymond Light & Co.*, 92 Wash. 330, 159 Pac. 183, P. U. R. 1916F, 437; *Everett v. Department of Public Works*, 125 Wash. 341, 215 Pac. 1045, P. U. R. 1923E, 218; *Monroe Water Co. v. Monroe*, 135 Wash. 355, 237 Pac. 996; *State v. Department of Public Works*, 143 Wash. 67, 254 Pac. 839, P. U. R. 1927C, 781; *Addy v. Fruitdale-on-the-Sound Water Co.* (Wash.), 3 Pac. (2d) 541, P. U. R. 1932A, 71.

West Virginia. St. Mary's v. Hope Nat. Gas Co., 71 W. Va. 76, 76 S. E. 841, 43 L. R. A. (N. S.) 994; *Mill Creek Coal & Co. v. Public Service Comm.*, 84 W. Va. 662,

100 S. E. 557, 7 A. L. R. 1081, P. U. R. 1920A, 704; *Berkley Springs Water Works Co. v. Public Service Comm.*, 93 W. Va. 180, 116 S. E. 140, P. U. R. 1923C, 344; *Charleston v. Public Service Comm.*, 95 W. Va. 91, 120 S. E. 393, P. U. R. 1924B, 601; *Natural Gas Co. v. Public Service Comm.*, 95 W. Va. 557, 121 S. E. 716, P. U. R. 1924D, 346; *Pittsburg & Co. Gas Co. v. Public Service Comm.*, 101 W. Va. 63, 132 S. E. 497, P. U. R. 1926D, 280; *Huntington v. Public Service Comm.*, 101 W. Va. 378, 133 S. E. 144, P. U. R. 1926D, 835; *Charleston v. Public Service Comm.* (W. Va.), 159 S. E. 38, P. U. R. 1931E, 74.

Wisconsin. State v. Sheboygan, 111 Wis. 23, 86 N. W. 657; *Eau Claire v. Wisconsin-Minnesota Light & Co.*, 178 Wis. 207, 189 N. W. 476, P. U. R. 1922D, 666; *Wisconsin-Minnesota Light & Co. v. Railroad Commission*, 183 Wis. 96, 197 N. W. 359, P. U. R. 1924C, 534; *Wisconsin-Minnesota Light & Co. v. Railroad Commission*, 183 Wis. 104, 197 N. W. 359, 363, P. U. R. 1924C, 534; *Pabst Corp. v. Milwaukee*, 190 Wis. 349, 208 N. W. 493, P. U. R. 1926D, 290; *J. Greensbaum Tanning Co. v. Railroad Commission*, 194 Wis. 634, 217 N. W. 282; *Milwaukee v. Railroad Commission* (Wis.), 240 N. W. 165, P. U. R. 1932B, 339.

This principle of the power of the municipality to fix and regulate rates after the enactment of the public service commission law is reiterated in the case of *Baton Rouge Waterworks Co. v. Louisiana Public Service Comm.*, 156 La. 539, 100 So. 710: "We find that the power to supervise, regulate, and control the waterworks company and to fix rates was specifically and unmistakably granted to the city of Baton Rouge by its legislative charter.

* * * We are unable to see how language could be used which would be more specific and positive and at the same time be more comprehensive and all-embracing. The authority to provide an adequate water supply manifestly includes the power to do and to perform everything incident thereto and necessary to attain that object. * * * Our conclusion is, therefore, that the city of Baton Rouge, at the time of the adoption of the Constitution of 1921, was vested with the power to regulate, supervise, and control the Baton Rouge Waterworks Company, and to make rates to govern the water supplied by the said company, and this power was not withdrawn nor affected by anything said in the constitution conferring similar powers on the public service commission, but was expressly reserved to the said city."

A franchise contract fixing rates under proper authority is binding on both parties for as the court said in the case of *Arkansas Light & Power Co. v. Cooley*, 138 Ark. 390, 211 S. W. 664, P. U. R. 1919E, 626: "A grant by a city council to a public service company of a franchise to supply water and light to a municipality and the inhabitants thereof at certain stipulated rates when accepted becomes a contract between the municipality and the grantee, and the conditions therein are binding, the same as the terms of any other contract, both on the municipality and the company. * * * As we have already seen, the grant to the defendant company in the first instance of the right to furnish water and electric lights to the city of Arkadelphia and its inhabitants, when accepted, became a contract between the municipality and the defendant company. In making the contract the municipality was acting for the private benefit of itself and its inhabitants, and its contracts of that character are governed by the same rules that govern contracts of private individuals. Therefore, like other contracts, a contract between a municipality and a public service company may be modified by mutual consent. * * * The property owners had no vested right in the contracts between the city and the public service company, and it is not claimed that an unconscionable, extortionate, or unreasonable rate was provided in the ordinances."

A municipality with authority, under the state constitution, to grant franchises for the use of its streets may lay down the conditions under which it will grant the franchise, and when the conditions imposed by the municipality are accepted by the utility, both parties are bound, as is indicated in the case of *Chrysler Light & Power Co. v. Belfield*, 58 N. Dak. 33, 224 N. W. 871, P. U. R. 1929E, 426, where the court expressed the rule as follows: "The power reserved by section 139 of the Constitution to a village or city to either grant or refuse permission to an electric light company to occupy the streets of such village or city with the structures of such lighting company is not limited to a simple granting or denial of permission to use the streets for such purposes; a village or city may permit such use of its streets on certain conditions only, and, if the electric light company accepts the permission or franchise so granted, all valid conditions or restrictions attached thereto become binding upon it. * * * The plaintiff having accepted the franchise, it also accepted the conditions, and it can not ask to be relieved from its contract and that another be made in place thereof because it failed to make an advantageous bargain with the city. The city of Belfield had authority to contract with an electric light company for the lighting of its streets."

§ 525. **Rate regulation suspended by contract fixing rate.**—The Supreme Court of the United States in the case of *Detroit, Michigan v. Detroit Citizens St. R. Co.*, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. 410, decided in 1902, a rate-contract case, said: "It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinance in question, including rates of fare. But there can be no question in this court as to the competency of a state legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to the rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such contract.⁶ * * * The contract once

⁶ *New Orleans Gas Light Co. v. Louisiana Light &c. Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. 273; *St. Tammany Water Works Co. v. New Orleans Water Works*, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. 405; *Walla Walla,*

Washington v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. 77; *Los Angeles, California v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. 736; *Freeport Water Co. v. Freeport, Illinois*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. 493.

having been made, the power of the city over the subject, so far as altering the rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract."

The same court in the case of *San Diego Land &c. Co. v. National City, California*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804, decided in 1899, observed: "That it was competent for the state of California to declare that the use of all water appropriated for sale, rental, or distribution should be a public use, and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county, or town, or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted."

That a contract fixing rates made under proper authority is binding and final on the question is the effect of the decision in *Wichita Water Co. v. Wichita, Kansas*, 234 Fed. 415, P. U. R. 1916F, 947,⁷ as follows: "On December 18, 1908, or some twenty-six years after the making of the original contract which the city had undoubted power under the statute * * * to make for some fixed period of time, the subsequent agreement, for a valuable consideration moving to defendant city, was entered into, adopting and ratifying the rates charged private customers and obliging the city to perform its terms and conditions so modified for the remainder of the contract period of about fourteen years. And when but one-half of this period had expired the ordinances sought to be enjoined in this case were passed. To now hold, after the lapse of such a short period of time as had intervened since the subsequent ratification agreement was entered into, and the enactment of the ordinance of September, 1915, that the original contract was ultra vires and void, hence its formal subsequent ratification and adoption by the city was likewise void and of no effect, leaving the city to ordain such rates of charge as its governing body might deem proper, so long as the rates so adopted can not be shown by the water company to be void because confiscatory of its property rights, and at a time when the city has in its possession and retains the fruits of the subsequent contract, shown by the record to amount to many thousands of dollars, would seem to my mind, most inequitable and unjust."

⁷ Appeal dismissed in 264 Fed. 1020.

§ 526. **Municipal officers competent to fix rates when disinterested.**^a—The case of *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48, decided in 1884, is a leading one to the same effect and is also of interest in this connection in deciding that the municipal officers of any particular municipality are not incompetent to fix rates for municipal public utility service to be furnished within its limits, although the municipality is an interested party in the matter, because it is a logical and necessary part of their official duty. The court said: "Long before the constitution of 1879 was adopted in California statutes had been passed in many of the states requiring water companies, gas companies, and other companies of like character, to supply their customers at prices to be fixed by the municipal authorities of the locality; and, as an independent proposition, we see no reason why such a regulation is not within the scope of legislative power, unless prohibited by constitutional limitations or valid contract obligations. Whether expedient or not, is a question for the legislature, not the courts. It is said, however, that appointing municipal officers to fix prices between the seller and the buyers is, in effect, appointing the buyers themselves, since the buyers elect the officers, and that this is a violation of the principle that no man shall be a judge in his own case. But the officers here selected are the governing board of the municipality, and they are to act in their official capacity as such a board when performing the duty which has been imposed upon them. Their general duty is, within the limit of their powers, to administer the local government, and, in so doing, to provide that all shall so conduct themselves and so use their own property as not unnecessarily to injure others. They are elected by the people for that purpose, and whatever is within the just scope of the purpose may properly be entrusted to them at the discretion of the legislature."

That the creation of the public utilities commission did not abrogate contracts fixing rates for service is clearly decided in the case of *Columbus v. Public Utilities Comm.*, 103 Ohio St. 79, 133 N. E. 800, to the effect that: "It has become established by numerous decisions of this court that an ordinance adopted by the municipality and accepted by the company constitutes a contract, and that the rights of the parties thereunder are to be determined by its terms. * * * The claim that a stipulation for a maximum rate for service can not be made a part of the

^a This section (§ 509, second edition) cited in *Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146, 166 N. W. 998, P. U. R. 1918D, 41.

consideration for the consent is not justified. The consent is purely discretionary with the city, and no one would contend that mandamus would lie to compel the consent, or that any power other than the legislative body of the city could dictate the terms and conditions. * * * We have therefore reached the conclusion that the rate stipulation is, upon reason and principle, a valid condition to the consent contract. * * * The powers conferred by statute upon the public utilities commission are in the most general terms, and the only specific provisions contained therein, giving the right to terminate existing contracts, are found in sections 614-19, General Code, which apply only to contracts for an indeterminate period, or those which by their terms may be terminated by notice. That section can not, therefore, apply, because the franchise of 1899 runs twenty-five years, and is not terminable by notice. * * * We therefore hold that the city had the power to give or withhold its consent to the use of its streets for underground conduits; that, as one of the conditions to such consent, it might stipulate a maximum rate for a period of twenty-five years; that such a stipulation was agreed to by the telephone company and observed by it without objection for approximately eighteen years; that the contract in which consent was given subject to the condition that the maximum rate therein named would be observed was valid; and that its obligations may not be impaired. * * * To the same effect are 3 Dillon on Municipal Corporations (5th edition) 1952, and Pond on Public Utilities, section 431."

That the municipality providing public utility service may fix the rate therefor independently of the Colorado State Commission is decided in the case of *Holyoke v. Smith*, 75 Colo. 286, 226 Pac. 158: "On principle it would seem entirely unnecessary to give a commission authority to regulate the rates of a municipally owned utility. The only parties to be affected by the rates are the municipality and its citizens, and, since the municipal government is chosen by the people, they need no protection by an outside body. If the rates for electric light or power are not satisfactory to a majority of the citizens, they can easily effect a change, either at a regular election, or by the exercise of the right of recall."

The validity of a contract fixing rates for public utility service will be upheld under the public utilities act, for as the court said in *Western Electric Co. v. Jamestown*, 47 N. Dak. 157, 181 N. W. 363: "It does not deprive a city of its power and privileges in creating or enforcing a franchise granted for the use of its

streets or highways by a public utility. It does not pretend to grant the railroad commissioners the power to determine what shall be the consideration to be paid for the use or exercise in a city of the privilege of a franchise. The defendant city had the authority to grant or permit a franchise to the plaintiff for the use of its streets and highways and to regulate the use of the same. It still has that authority. Section 3599 (13-24), C. L. 1913. It is specifically reserved to a city by the constitutional provision which provides that no law shall be passed by the legislative assembly granting the right to construct and operate an electric light plant within any city without requiring its consent. Section 139, North Dakota Constitution. This right of franchise granted to the plaintiff in 1902 was a right of value, a right of property, and validly, the subject of a legal contract. * * * Pond, Public Utilities, section 114; McQuillin, Municipal Corporations, volume 4, sections 1617-1636. The franchise so granted constituted a contract between the state, through the municipality representing the state by its permission, and the company."

Where the municipality has the power to fix and regulate rates but has failed to exercise it, this does not defeat the right of the public utility to realize a reasonable rate for its service by fixing the rate itself. And this rate will obtain until set aside as unreasonable by the courts or by proper state or municipal authorities, as is clearly indicated in the case of *Hutchinson v. Hutchinson Gas Co.*, 125 Kans. 346, 264 Pac. 68, P. U. R. 1928C, 493, where the court expressed this rule as follows: "It should therefore be perfectly clear that if defendant was a one-city utility, whose gas rates and charges were within the primary jurisdiction of the governing body of the city of Hutchinson, the proper course for the city was to have had a proceeding instituted before itself in its governmental capacity and to have given a hearing to all concerned, including the gas company, and then promulgate a schedule of rates to be observed by the gas company. * * * If the gas company had not invoked a review by the public service commission or had failed before that tribunal, its compliance with the rates imposed by the city could have been enforced by mandamus. * * * It will thus be seen that if the city of Hutchinson had the original jurisdiction over gas rates in that city, it has not exercised that jurisdiction. * * * To give judicial sanction to such a manoeuvre would be a denial of due process of law in its most vexatious form, since the right of a utility company to prescribe and collect proper rates of its own

making under such circumstances is thoroughly established. * * * It is therefore apparent that while the courts of this state have no power to make rates to be observed by public utilities, they do have judicial power not only to protect the utilities from officially imposed confiscatory rates, but likewise to prevent these utility companies from exacting rates which are excessive * * *. And so in this litigious warfare between the Hutchinson Gas Company and its patrons in the matter of rates and service, it seems clear that without trenching upon non-judicial power a court of competent jurisdiction may properly enjoin excessive rates exacted by a utility quite as readily as it enjoins confiscatory rates imposed on the utility by official dictation. * * * When a gas rate prescribed by official authority has been set aside as noncompensatory by a court of competent jurisdiction, the utility company may prescribe and collect reasonable rates of its own making until other lawful rates are promulgated by official authority."

§ 527. Express contract for reasonable period fixing rates is valid.—Where the municipality has power expressly conferred upon it to contract for municipal public utility service, the municipality, in the exercise of such a right for the purpose of securing the desired service by agreeing on a fixed rate for a reasonable period, may thereby suspend its right to regulate the rates further during that period; provided, however, the agreement to that effect is made expressly, for as the court in the case of *Omaha Water Co. v. Omaha, Nebraska*, 147 Fed. 1, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614, decided in 1906, said: "The making of a contract for the construction and operation of waterworks wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate. It is to procure water and to get rates for the city and for its inhabitants. Hence, it is that the legislature of a state, unless prohibited by its constitution, may empower a city to suspend by contract, and a city may suspend in that way during a reasonable term of years, its power to change or regulate the rates which an individual or corporation may collect of private consumers. * * * An agreement for such a suspension will not be raised by mere implication. Where the meaning of a grant or contract regarding such a suspension or regarding any public franchise or privilege is ambiguous or doubtful, it will be con-

strued favorably to the rights of the public. Where the grant or the contract is clear and plain it will be protected and enforced."

§ 528. **Power to contract gives power to fix rates until revoked.**—That the power conferred upon the municipality to supply itself with the service of any particular municipal public utility includes the power to agree upon a rate by contract, but that such power being delegated by statutory authority may be revoked at the will of the legislature, is the effect of the decision in the case of *Los Angeles City Water Co. v. Los Angeles, California*, 88 Fed. 720, decided in 1898, where the court said: "In procuring water, or any other commodity, by purchase, one of the first things to be considered and agreed upon is the matter of price. Therefore, to hold that general power, without limitation, in a municipal corporation, to supply the city with water, does not include power to agree upon price, it seems to me, would be a solecism. * * * This delegation of power to the city was not, of course, a relinquishment by the legislature of its control over the subject. The legislature could at any time revoke the power delegated to the city, and provide directly, through agencies of its own selection, for supplying the city with water, provided such revocation or provision should not impair any previously vested right."

During the period of enjoying the franchise, service must be given at the existing rate for as the court said in *Ft. Smith Light & Traction Co. v. Bourland*, 160 Ark. 1, 254 S. W. 481⁹: "Appellant has the right, under its present status as the holder of an indeterminate permit, to withdraw altogether from the territory; but as long as it occupies the field it should not be permitted, in the language of the Supreme Court of the United States, to 'pick and choose,' taking the part which is profitable and withdrawing from that portion which is unprofitable. The project must, in other words, be considered as a whole, in determining whether a given rate or requirement be confiscatory."

Contracts between private consumers and public utilities for service in California are made subject to the reservation of the police power of the state, under which the state may modify all such contracts and regulate the rates for such service. This principle is set out by the federal court in this jurisdiction, as follows, in the case of *Market St. R. Co. v. Pacific Gas & Electric*

⁹ Affirmed in 267 U. S. 330, 69 L. ed. 631, 45 Sup. Ct. 249, rehearing denied and opinion amended in 268 U. S. 676, 69 L. ed. 631, 45 Sup. Ct. 511.

Co., 6 Fed. (2d) 633, P. U. R. 1926A, 509, where the court said: "On the question of the power of the state to regulate the contracts of its public utilities with their consumers the law is now well settled. 'The courts hold that all contracts relating to public service, entered into between the corporation operating a public utility and the private consumer, contain from the very nature of their subject-matter an implied reservation of the right of the state to lawfully exercise its police power for the general welfare, and that there is no impairment of the obligations of contract within the guaranties of the state or federal Constitution, even though said contract is thereby rendered partially or wholly invalid.' * * * And it is no impediment to the power of a public rate-regulating body that a rate sought to be changed has been established by contract between the utility and a consumer, if by the exercise of such power the former is relieved of a burden which changed conditions have rendered onerous and threatens to result in the utility's impaired efficiency in its service to the public. The maintenance of a proper return upon the value of the property devoted to the public service is in the interest of the public, since such service is ultimately dependent upon the continued ability of the utility to attract the money of investors, in doing which it must meet prevailing conditions in respect to investment returns. When, therefore, the public regulating body authorizes a change of rates with a view to affording an adequate return upon the value of the property devoted to the service, its action is in the public interest. * * *

It is next urged by the plaintiff that, when the contract was made in 1909, the power company had not yet become a public utility, and nothing that the latter did thereafter could make its prior existing contract subject to regulation. Defendant has cited cases, which we regard as highly persuasive, to the effect that all the contracts of a public utility, whenever made, must yield to the public interest. Under these authorities the sole question is whether, at the time regulation is attempted, the company affected has undertaken public service, and the date of its contract is immaterial. *Yeatman v. Towers*, 126 Md. 513, 95 Atl. 158, 160; *Producers Transportation Co. v. Railroad Commission of the State of California*, 251 U. S. 228, 231, 40 Sup. Ct. 131, 64 L. ed. 239; *Manigault v. Springs*, 199 U. S. 473, 480, 26 Sup. Ct. 127, 50 L. ed. 274. Assuming, for the sake of argument, that the orders of the railroad commission would have been void, had the property of the power company not been dedicated to public use before the date of the contract, in 1909, there is an

abundance of evidence in the record that such dedication had at that time been made. * * * The fact that the power of eminent domain was exercised might of itself be held to be conclusive evidence that the power company, before making the contract, had devoted its property to service of the public. *Producers' Transportation Co. v. Railroad Commission of the State of California*, supra. The circumstances enumerated by Judge Johnson are conclusive that on August 31, 1909, the power company had undertaken public service; and, taken together with the recitals of the contract itself, they indicate beyond all reasonable doubt that such service, as was well known to United Railroads, was contemplated by the power company, with the consequence that the latter company and all its contracts would become subject to public regulation. *Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co. et al.*, 267 U. S. 231, 45 Sup. Ct. 263, 69 L. ed. 588; *Id.*, 148 Ark. 260, 230 S. W. 897, 901, 902. The case just cited, decided as lately as March 2, 1925, is, we think, conclusive of the propriety of the orders under consideration. * * * That the power company in the case at bar contemplated public service is also apparent from the contract itself, which in its third section provides: 'Power company at all times shall be free to use or to sell to others than Railroads Company any portion of the energy and/or power which can be produced, * * * subject to Railroads Company's first and preferential right. * * *' Its fourteenth section provides that United Railroads shall be a 'preferred customer' and its second that, in addition to energy which that company may demand upon twelve months' written notice, the power company is obliged to 'furnish such additional power on less than twelve months' written notice, if desired by Railroads Company, to the extent that it has power unsold at the time of delivery of notice.' As proof that such public service was in fact undertaken, it is to be noted that within less than nine years its activities were so enlarged that in 1917 it supplied electricity for heat, light, and power purposes over an extensive territory to 6,196 consumers, including in their number several large mines, a cement mill, and other electric railways than United Railroads. 16 Cal. R. C. Dec. 161, 162. Accordingly, we hold that when the contract was made its parties contemplated a dedication by the power company of its property to public use. Plaintiff has been required to submit to an increased rate; but the contract has not been abrogated, and its preferential rights remain unimpaired. *Chicago Railways v. City of Chicago*, 292 Ill. 190, 201, 202, 126 N. E. 585,

598. As was said by the circuit court of appeals for this circuit, less than two months ago: 'A lawful change of a rate fixed by a public service company under a contract for doing a service does not destroy the contract, but modifies its terms consistently with what presumably the parties to the contract incorporated in their agreement.' * * * So long as the state did not intervene, both parties were bound by all the contract's terms (Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291, 300, 159 Pac. 865, L. R. A. 1917E, 680); but, because of the nature of its subject-matter, either might, at any time after the intervention of the public interest, have made application to the railroad commission to be relieved from a rate which had become either unreasonably high or unreasonably low (Salt Lake City v. Utah Light & Traction Co., 52 Utah 210, 173 Pac. 556, 3 A. L. R. 715, supra). Hence plaintiff's rights have not been abridged, for at their inception they were subject to just such an eventuality as actually occurred. * * * Plaintiff, therefore, to make good its present contention, must establish that it has been denied a judicial review upon the question of the existence of facts essential to the exercise of the jurisdiction of the railroad commission, through whose action it claims to have been deprived of its property. This, the plaintiff claims, Public Utilities Act, section 67, in fact does. That section, however, has been broadly interpreted by the California Supreme Court, so as to afford a review upon the question of these essential facts. In *Traber v. Railroad Commission of the State of California*, 183 Cal. 304, 307, 191 Pac. 366, 368, it is said: 'Notwithstanding the declaration of section 67 that the commission's determination of matters of fact is not subject to review, it must be held that its determination upon the question whether or not the facts existing are sufficient to bring the case within the scope of its powers must be subject to review, so far as they present a question of law bearing upon that subject, and that the provision that the "conclusions" of the commission on the facts are final does not apply to facts necessary to the existence of the jurisdiction of the commission to act. *Del Mar, etc., Co. v. Eshleman*, 167 Cal. 677, 140 Pac. 591, 948.' * * * From what has been said it follows: (1) That the service contract entered into on August 31, 1909, between United Railroads and the power company was on October 22, 1918, and at all times since has been, subject to regulation by the railroad commission of the state of California; (2) that the Public Utilities Act, under and by authority of which said commission regulated said contract, is not violative of

the provisions of the federal Constitution; and (3) that the orders herein complained of are valid, proper and in all respects legal."

Although the municipal corporation originally may have had the right to fix rates, when the state confers the right on its public service commission to do so, the municipal power of regulation in this respect is thereby terminated, as is indicated in the case of *Yonkers v. Maltbie*, 231 App. Div. 415, 248 N. Y. S. 75, P. U. R. 1931C, 254, where the court said: "Thus it is clear that this last franchise was intended to, and that it did, modify and supersede all of those which preceded. It was granted under the power reserved to the legislature, which had been delegated to the public service commission. * * * On April 7, 1921, the commission made an order that it is unreasonable to require the company to transfer passengers between points in different municipalities for a single fare of five cents, and authorized and empowered the company to collect on the basis of the zoning system. * * * Thus, the rates of fare sought to be raised are not the original rates, fixed by the city, but are those fixed by the commission in 1921."

As the franchise is a contract, where there is a provision calling for the submission of fares to arbitration, this plan is valid and binding on the parties and requires the finding of facts and the establishment of what constitutes a reasonable rate in the nature of an appraisal rather than that of a technical arbitration, as is indicated in the case of *Parks v. Cleveland R. Co.*, 124 Ohio St. 79, 177 N. E. 28, P. U. R. 1931E, 321, where the court said: "There being a real dispute in 1928, which the parties were unable to adjust by negotiations, there being a selection of arbitrators, a submission, and an award, the city itself, as well as any taxpayer on behalf of the city, will be estopped to question the regularity of that submission and award. * * * The language of the ordinance is that 'the rate of fare shall be arbitrated,' which is only stating in effect that 'the cost of service shall be appraised.' * * * While it is provided in the constitutional amendment of 1912, article 18, section 5, that the city can act only by ordinance, this is for the purpose of permitting a referendum upon its action. The relation between the city and the utility is by both of those sections expressly declared to be contractual. That a public utility franchise is a contract has been many times declared by this court. * * * Agreeing only to rates for the first five-year period, and leaving the rates for the other four periods to an independent inquiry,

inevitably leads to the conclusion that the rates for the future periods were to be reasonable rates, based upon cost of the product and service and a fair return upon the investment. This was a fact-finding process in the nature of an appraisal, and does not involve the rules of law to be applied to technical arbitrations and awards. If the contract had provided for arbitration of questions of a breach of the franchise contract or any other matters relating to the validity of the contract, a wholly different question would be presented."

On the termination of the franchise and the failure of the parties to agree on a reasonable rate for the service, the public utilities commission is authorized by statute in some jurisdictions, and is the proper authority generally, to determine the matter, for as the court said in the case of *Greenville v. Public Utilities Comm. (Ohio St.)*, 179 N. E. 131: "After all the agreements and ordinances had terminated by the lapse of time, and it had become self-evident to the gas company that no satisfactory agreement on rates was possible, the gas company applied to the public utilities commission for an order increasing rates for service. The city filed a protest against the issue of the order asked for, and moved the commission to dismiss the application for want of jurisdiction, for the reason that the relations between the city and the gas company were contractual in their nature, and that fact was a bar to the jurisdiction of the commission. The hearing on the application was set for a definite date, and then heard by the commission, with the gas company and the city duly represented. The commission was fully authorized by law to entertain the application for an order fixing rates."

Where the rate of return is insufficient, the railroad commission may fix a reasonable rate for the service, although this may be greater than that provided in the franchise, which thereby becomes void by such action of the state, through its commission, by virtue of statutory enactment, for as the court said in the case of *Milwaukee v. Railroad Commission (Wis.)*, 240 N. W. 165: "But, as insufficient revenue in 1928, to yield an adequate return upon the rate base, necessitated an increase in fare for the then existing single fare area at all events, the order increasing the fare can not be considered unreasonable or unlawful so as to justify the setting aside thereof by a court (section 196.46, Stats.) solely because of an increase in fare. That increase was necessary and proper at all events under the evidence and the findings of the commission. * * * However, as a matter of law, it is well established that franchise provi-

sions as to street railway rates, which are in derogation of the exercise of the sovereign power of the state with respect to such rates, are void and of no effect upon the exercise of such power by the state; and that in this state that power to control street railway rates is vested in the railroad commission. * * * The commission's conclusions, and reasons therefor, * * * are sound. The time had evidently arrived when certain portions of the former extra fare zone areas were, to all intents and purposes, part of the area served by the urban system, and, consequently, it was reasonable and proper to include those portions in the new single fare area."

§ 529. **Power to grant municipal franchise rights on conditions construed liberally.**—Under the authority conferred upon the municipality to impose such terms and conditions as it sees fit in granting its consent to the use of its streets for a municipal public utility, the courts are very liberal in permitting such municipalities to impose conditions practically without limitation so far as they are not in conflict with other statutory or constitutional provisions. The power to fix rates for the service to be rendered has been frequently held to be properly included within such authority, for as the court said in the case of *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197, decided in 1908: "It may be said then, that in order to safeguard the rights of its inhabitants who use gas, it is not only reasonable that the city should have this power to fix rates, but it is highly expedient—indeed, it is necessary—that it should possess that power. * * * The power to prescribe rates by contract—and that is the power which was exercised in this case—is a very different power from the legislative power regulating rates."

§ 530. **Individual inhabitant can enforce franchise rights.**—The Supreme Court of New York in the case of *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504, decided in 1906, held that the individual inhabitant has the right in his own name to compel the municipal public utility to provide him service at the rate fixed in the franchise which stipulated the rate to be charged for the service rendered to the individual inhabitant as well as to the municipality itself. In the course of its opinion the court said: "In the case before us we have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with pure and wholesome water at reasonable rates. * * * The municipality sought to protect its inhabitants,

who were at the time of the execution of the contract consumers of water, and those who might thereafter become so, from extortion by a corporation having granted to it a valuable franchise extending over a long period of time. We are of opinion that the complaint states a good cause of action."

§ 531. **Municipal grant of monopoly rights may be conditioned on control.**—That no such statutory authority is necessary to give the municipality power to fix the rates and regulate the service to be rendered, but that it may make such provisions conditions precedent to the granting of its consent to the use of its streets and to the furnishing of service to its inhabitants by any particular municipal public utility, is a well-established principle which must be invoked to secure the necessary protection in those municipalities where the express authority to fix rates has not been conferred, for as the court in the case of *Long Branch Comm. v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474, decided in 1905, said: "But, independent of such statutory provision, I think it is the province and the duty of the municipality, whenever opportunity offers, to exercise its power in the protection of its inhabitants against extortion, and to secure them a supply of water and of gas from corporations, assuming to furnish those commodities, at reasonable rates. The water company is exercising a public franchise, which, from its nature and mode of exercise, is necessarily, during its continuance, a practical monopoly, and it follows beyond all question that its charges for its supply must be reasonable. And it would be strange, indeed, if the municipal government, which, so to speak, imposes this monopoly upon its citizens, were powerless to protect them against unreasonable charges."

§ 532. **Acceptance of conditions imposed by city creates binding contract.**¹⁰—Where the municipality has the right to withhold its consent or extend it at will it has ample power to make all necessary provisions for securing adequate service at reasonable rates, for as the court in the case of *Indianapolis v. Consumers Gas Trust Co.*, 140 Ind. 107, 39 N. E. 433, 27 L. R. A. 514, 49 Am. St. 183, decided in 1895, said: "It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies."¹¹ * * * It was not limited alone to the granting of this franchise, but it had the right to pre-

¹⁰ This section (§ 431 of 2d edition) cited in *Moorhead v. Union Light, Heat &c. Co.*, 255 Fed. 920, and *Columbus v. Public Utilities*

Comm., 103 Ohio St. 79, 133 N. E. 800.

¹¹ *Citizens Gas & Min. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624.

scribe and impose terms and conditions.¹² * * * When these terms and conditions proposed by appellant were accepted by the appellee and complied with, it became a binding contract."¹³

§ 533. **Service must be provided according to terms of contract.**¹⁴—After the municipal public utility has accepted the consent of the municipality on the conditions specified, and installed its service, the contract is consummated, and where the conditions provide for the fixing of the rate it is a material part of the contract and absolutely binding on the municipal public utility, for as the court, in the case of *Westfield Gas & Mining Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033, said: "The town had the right in granting the use of its streets, to impose such reasonable requirements, terms, regulations, and conditions therein upon those accepting the privileges and benefits of the grant as its own prudence and discretion might dictate, so as not to restrict, however, the town in its legitimate exercise of legislative powers. The authority to prescribe such terms and conditions, if not expressly conferred by the act of 1887, may at least be reasonably inferred therefrom, in order that the full force and effect may be given to the power expressly granted."¹⁵

* * * Having accepted the franchise granted by the ordinance, and agreed to be bound by the express terms as to the price of gas, and having engaged in the exercise of the privileges under the grant, and so continuing to do, it is now precluded from successfully refusing to discharge its obligations to the inhabitants of the town who desire to use its fuel upon the ground that they refuse to pay a price therefor in excess of the maximum rate fixed by the ordinance. The town could not, by its subsequent action, impair or restrict the rights granted to, accepted, and exercised by appellant. Neither will the latter be permitted, under the circumstances, to decline to comply with the terms or conditions assumed, by which it is expressly obligated."

§ 534. **Failure of municipality to provide rate in franchise.**—The case of *In re Pryor*, 55 Kans. 724, 41 Pac. 958, 29 L. R. A.

¹² *Elliott Roads & Streets* (4th ed.), § 940, p. 1234; *Dillon, Municipal Corporations*, § 706; *Wood, R. Law*, Vol. 2, p. 986.

¹³ *Western Paving &c. Co. v. Citizens St. R. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. 462.

¹⁴ This section (§ 432 of 2d edi-

tion) cited in *Moorhead v. Union Light, Heat &c. Co.*, 255 Fed. 920.

¹⁵ *Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. 214; *Indianapolis v. Consumers Gas Trust Co.*, 140 Ind. 107, 39 N. E. 433, 27 L. R. A. 514, 49 Am. St. 183, and authorities there cited.

398, 49 Am. St. 280, decided in 1895, suggests the practical importance of this principle. Nine years after granting a franchise to erect and maintain a gas system within its limits, without having made any provision as to the rates to be charged for the supply of such gas for domestic purposes, upon which grant gas works were duly installed, the city of Iola, Kansas, passed an ordinance fixing the maximum rates to be charged for such service at much less than those theretofore charged. In denying the validity of this ordinance attempting to fix rates for such service the court said: "The act providing for the organization and government of cities of the third class [to which Iola belonged], contains no express grant of power to fix or regulate the prices of gas, water or any other article of necessity or luxury. * * * Certainly there is no express authority conferred upon the municipal authorities by this section [providing general powers in corporations to provide cities with gas or water 'with the consent of the municipal authorities thereof, and under such regulations as they may prescribe'] to regulate the price of gas or water. Whether they might as a condition of their consent, provide that gas or water should be furnished to the city or to its inhabitants at not exceeding certain prescribed rates, we do not now inquire. Consent was granted by Ordinance No. 268, to the Iola Gas and Coal Company, its successors and assigns [of whom petitioner is assignee] without annexing any condition as to rates. * * * In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this is a sovereign power, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms or by necessary implication. No such power is expressly conferred upon the cities of the third class, and we do not think the right can be implied from any express provision, unless possibly that in the grant of consent to any person or corporation so to use the streets and public grounds of the city a condition might be imposed as to the maximum rates to be charged."

The case of *Wabaska Electric Co. v. Wymore*, 60 Nebr. 199, 82 N. W. 626, decided in 1900, was an action to restrain the enforcement of an ordinance reducing rates for electric light furnished by the plaintiff under a franchise from the defendant city, which failed to stipulate the rates to be charged, where the court said: "In dealing with this feature of the case it is not necessary to determine whether the city was authorized by its charter, as it existed in 1889, to grant any person, company or corporation, an exclusive franchise for the erection and operation

of an electric light plant. The plant has come into being; it is now established, and the owner thereof has the right to furnish light to its private customers on such terms as may be mutually satisfactory to the parties concerned. The defendant has plainly no power or authority to regulate the plaintiff's charges for lights furnished to the inhabitants of Wymore. The legislature has, of course, the right to fix the price at which gas or electric lights shall be supplied by one who enjoys a monopoly of the business by reason of having an exclusive franchise; and such right may be delegated to the governing body of a public or municipal corporation. But the power of regulating the charges for electric lights is not found among the grant of powers contained in defendant's charter. There is no such authority given, either expressly or by implication and, therefore, it does not exist."

The limitation on the power of municipalities to fix rates is well expressed in the case of *Victoria v. Victoria Ice, Light &c. Co.*, 134 Va. 134, 114 S. E. 92, 28 A. L. R. 562, P. U. R. 1923A, 465, as follows: "An unalterable rate may be reasonable when established, but [may] become unreasonable thereafter because of changed conditions. So the asserted power to contract for such unalterable rates is irreconcilable with, and destructive of, the authorizing power to make adequate provision for reasonable rates. * * * The overwhelming weight of authority is to the effect that a municipality, in the absence of any direct regulation of rates by the state, may enter into a contract with a public utility whereby the rates to be charged for service to the public are fixed, which contract, as between parties themselves, is binding. The state nevertheless has power which it may delegate to a commission to change such rates whenever, because of changed conditions, such rates are no longer reasonable. Franchise rate contracts, unless clearly authorized by the state, are such contracts as may be changed by the state without infringing the constitutional guaranty. * * * Again there is authority to the effect that, while franchise contracts as to rates may have been valid when made, the city, as one of the contracting parties, was only acting as agent of the state, and, as principal, the state may at any time waive any of its rights therein. This has been held in *Salem v. Salem Water Co.*, 255 Fed. 295, 166 C. C. A. 465, P. U. R. 1919C, 956, and by the state courts in Delaware, Idaho, Indiana, Maine, Massachusetts, New Jersey, New York, Oregon and Washington. Note, 3 A. L. R. 742."

§ 535. **Regulation of streets not authority to regulate rates during franchise.**¹⁶—The same principle is equally well established and applicable to the giving of telephone service in municipalities, which has practically all of the elements of a natural monopoly. In the early case of *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. 370, decided in 1888, the court laid down this rule of law as follows: "This was a prosecution against the Bell Telephone Company of Missouri for the violation of an ordinance, which provides that the annual charge for the use of the telephone in the city of St. Louis shall not exceed fifty dollars. * * * The important question, then, is whether the city of St. Louis has the power to enact the ordinance in question. * * * If the city has such power it must be found in a reasonable and fair construction of its charter. * * * That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like, is obvious. Such regulations have been obeyed by this defendant. Conceding all this, we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance can not be upheld, on any such ground. * * * The power to regulate, it may be conceded, gives the city the right to make police regulations as to the mode in which the designated employment shall be exercised. But taking these charter provisions together, we think it would be going to an extreme length to say that they confer upon the city the power to fix telephone rates. * * * We conclude that the city has no power to pass the ordinance in question by reason of any of the charter powers before considered. * * * To say that under this general power [of the general welfare clause] the city may fix rates for telephone services would be going entirely too far."¹⁷

§ 536. **Power of municipality to regulate rates not provided in franchise—Police regulations.**—This same principle, with reference to the power of cities to regulate the rates for telephone service only in those cases where the right to do so has been expressly conferred upon the municipality or can be necessarily

¹⁶ This section (§ 434 of 2d edition) cited in *Western Elec. Co. v. Jamestown*, 47 N. Dak. 157, 181 N. W. 363.

¹⁷ This principle was fully affirmed by the same court in 1905, in *State v. Missouri & Kansas Tel. Co.*, 189 Mo. 83, 88 S. W. 41.

implied from some express grant by the state, is clearly stated, together with the reason on which the rule of law is based, in the case of *State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657, decided in 1901. In the course of its opinion the court said: "Whatever power a municipality possesses over the wires and poles of a telephone company in its streets must be granted it by the legislature—2 Dillon Municipal Corporations, section 698. The charter of the city of Sheboygan empowers it to enact proper ordinances and regulations for the government and good order of the city for the benefit of trade and commerce for the suppression of vice and the prevention of crime, to prevent the encumbering of streets, to provide for the removal of obstructions therein, to regulate the manner of using streets and to protect them from injury. As we have already seen, this grant of power does not authorize the city to wholly prevent the relator from doing business within its limits. No express authority is given the city to regulate charges for telephone service, nor is there any express grant of power, from which such authority can necessarily be implied. * * * The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There is not the remotest relation between them. The attempt of the city to justify its position on that ground must fail. * * * Neither does the power come to the city under the general authority to pass ordinances for the government and good order of the city and for the benefit of trade and commerce. To say that under this general power the city may fix rates for telephone service would be going entirely too far."

The Supreme Court of Indiana in a series of decisions has firmly established in that state this principle as to the municipal regulation of rates for public utilities in connection with the matter of supplying natural gas to inhabitants of municipalities. The first case of *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734, decided in 1893, was a mandamus action to compel the appellant company to furnish gas at the price fixed by an ordinance of the town of Lewisville by the terms of which the said company was required to furnish gas at a lower price than it had been charging for such service. In deciding the question of the power of said town so to fix the price at which the appellant should supply the citizens with gas, the court said: "It is not contended that the general statute upon the subject of incorporating towns confers upon towns, when incorporated, the power to regulate the price at which na-

tural gas shall be sold. It is contended, however, that such power is conferred by an act of the general assembly, approved March 7, 1887. That act is as follows: 'Section 1. Be it enacted, etc., That the boards of trustees of towns, and the common councils of cities, in this state, shall have power to provide by ordinance, reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities, and to require persons or companies to whom the privilege of using the streets and alleys of such towns and cities is granted for the supply and distribution of such gas to pay a reasonable license, for such franchise and privilege.'

* * * There is not a word or a syllable to be found in this act indicating that the general assembly had in view any other purpose than that of securing the safe supply and use of natural gas. To secure the safe supply and use of natural gas is one thing and to fix the price at which gas shall be supplied is another and quite different thing. In our opinion it was not the intention of the general assembly to confer, by the act above set out, the power to regulate the price at which natural gas should be furnished. * * * The trustees of the town of Lewisville having no power to regulate the price at which natural gas should be furnished, the ordinance in question, purporting to do so is void upon its face."

The decision of this case was expressly affirmed by the same court in *Noblesville v. Noblesville Gas &c. Co.*, 157 Ind. 162, 60 N. E. 1032, decided in 1901, where the court said: "It will be doing violence to the rules of statutory construction to hold that under the law of 1887 [quoted in the case of *Lewisville Nat. Gas Co. v. State*, supra] the power of a city, when not reserved in granting a franchise, to prescribe the prices chargeable by its licensee to consumers of its gas, is free from fair and reasonable doubt."

That the city may not enforce a confiscatory rate and that it could not fix a rate finally for lack of authority is clearly decided in the case of *San Antonio, Texas v. San Antonio Public Service Co.*, 255 U. S. 547, 65 L. ed. 777, 41 Sup. Ct. 428: "That, in view of the admitted fact of confiscation, the court had power to deal with the subject, we are of opinion is too clear for anything but statement. And we think it is equally clear that as the right to regulate gave no power whatever to violate the constitution by enforcing a confiscatory rate,—a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract,—it follows that the solitary

question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate. Primarily the answer to that question must depend upon whether the Ordinance of 1899, fixing the five cents rate, was a contract. That it was not and could not be, we are of opinion, is the necessary result of the provision of section 17, article 1, of the state Constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges,' etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the Ordinance of 1899 to give it the contract consequence relied upon."

To the same effect, in holding that the power of the city to contract does not include the power to fix rates unless expressly conferred, the court said in the case of *Puget Sound Traction, Light &c. Co. v. Reynolds*, 223 Fed. 371¹⁸: "We are unable to yield assent, however, to the proposition that these franchise ordinances create inviolable contracts between the municipality and the company protected by the contract clause of the federal Constitution. That a city ordinance may constitute a contract within the meaning of the constitution is well settled, but it is equally well settled that a municipal corporation can not barter away the police power of the state by unalterably fixing rates and fares during the life of a franchise, unless specifically and expressly authorized so to do by the supreme legislative authority in the state."

By legislative authority the city council of municipal corporations in Alaska is given the power to regulate rates of public utilities after giving notice and a public hearing. After such hearing, wherein the council is not required to produce evidence although all interested parties may do so, the council by municipal ordinance may fix the rate from time to time under its general statutory authority to regulate the same. This principle is established as follows in the case of *Graff v. Seward*, Alaska, 20 Fed. (2d) 816, where the court said: "The laws of Alaska of 1923 provide a procedure for regulating rates by municipal corporations. The city council must give notice of a public hearing which may be continued from day to day. Public service corporations or individuals affected shall have a right to be present at the hearing, to be represented by counsel, to introduce evidence and compel the attendance of witnesses, and

¹⁸ Affirmed in 244 U. S. 574, 61 L. ed. 1325, 37 Sup. Ct. 705, 5 A. L. R. 13, P. U. R. 1917F, 57.

thereafter the council shall proceed to regulate and fix the rates by an ordinance. There is no provision requiring the common council to adduce testimony."

After fixing a rate by ordinance which the municipality passed under proper statutory authority, and which the public utility accepted, thereby creating a valid contract between the parties, the municipality would have no authority to change the rate during the period fixed by the ordinance, although it would have a continuing right to regulate rates if the ordinance were not submitted to the electors, which was a necessary step in its enactment, for a failure to do this would prevent the ordinance and franchise contract from becoming effective. This principle is well stated in the case of *Columbus Gas & Fuel Co. v. Columbus, Ohio*, 42 Fed. (2d) 379, P. U. R. 1930D, 476, as follows: "For many years the Columbus Gas & Fuel Company and the Federal Gas & Fuel Company, appellants, had been operating as public utilities in the city of Columbus, supplying natural gas to its inhabitants under municipal franchises. In the year 1924 the city undertook by ordinance to fix the price of such natural gas at forty cents per thousand cubic feet, net, for a period of five years from September 12, 1924. This ordinance was made the subject of attack, as confiscatory, in a suit filed in the United State district court at Columbus. Appeal from the final decree in such suit is now pending here. The five years covered by that ordinance being about to expire, the city council, on June 3, 1929, passed Ordinance 410-29, fixing the price at forty-eight cents for the remaining portion of 1929, and at a sliding scale of from sixty-five cents to fifty-five cents thereafter for a period of five years from January 1, 1930. * * * If the passage of Ordinance 410-29, and its acceptance, operated as a binding and effective contract, entered into, as it must then have been, under definite grant of sovereign power from the state to the municipality, the city could not thereafter, acting or purporting to act under the same grant of sovereign power, impair the obligation of such contract. The sole question, is, therefore, whether the passage and acceptance of Ordinance 410-29, without its submission to popular vote, resulted in a contract, with attending vested contract rights. * * * It seems to us clear that a duty to take the steps necessary to submit Ordinance 410-29 to the electors was to be implied from the provisions of section 192 of the charter, or must arise by reason of the passage and acceptance of the ordinance. The section, being a part of the fundamental law of the municipality, would be read into what-

ever contractual relation arose from the passage and acceptance of the ordinance. But obviously, until the ordinance was submitted to vote and thus made operative, the utility companies could acquire no right to its performance."

§ 537. Power to contract and to regulate distinguished.¹⁹—

In the Noblesville case, section 536, *supra*, the company sued to enjoin appellant city from enforcing an ordinance regulating the rates to be charged consumers of natural gas. It appeared that the franchise, originally granted said company, gave no exclusive right and fixed no time for its continuance and imposed no restrictions upon the price to be charged for gas either by express stipulation or a reservation to fix or control prices thereafter. The ordinance passed by the city later, however, fixed the maximum rates in particular cases that might be charged by anyone accepting its provisions, which the appellee company did expressly in writing, duly filed with the common council of said city. In deciding the case on this point in favor of the city the court said: "That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract. And the power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of one body, the other the consent of two. In this instance the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of its bargain. There is no merit in appellee's contention that the ordinance of 1888 fails for want of consideration. Appellee's original franchise of 1886 was without restriction as to rates; and it could have continued to enjoy its franchise and fix its own rates (if reasonable) if it had chosen to do so. By the ordinance of 1888 the city in effect proposed that any person, firm or corporation, including appellee, desiring the use of its streets and alleys as a means of marketing natural gas, might have the same, by undertaking to abide by and perform all the conditions set forth, including the limitation upon prices for gas. Appellee was not required to accept the new proposition. It might have gone on without a contract for chargeable rates, and taken its chances of legal interference, or it might free itself of uncertainty by accepting the certainty of contract. It chose the latter course, accepted the ordinance, and for the first time had a contract and a legal authorization to charge the price speci-

¹⁹ This section (§ 436 of 2d edition) cited in *Western Elec. Co. v. Jamestown*, 47 N. Dak. 157, 181 N. W. 363.

fied in the ordinance contract. This was a sufficient consideration."

That confiscatory rates will not be sustained and that contract rates made without the power to fix rates finally by the city will be set aside, if found to be unreasonable, is decided in *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 63 L. ed. 309, 39 Sup. Ct. 117, 9 A. L. R. 1420, as follows: "Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a state in an appropriate exercise of its police power, are invalid for the reason that, if given effect, they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the railroad commission. Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion. That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided in this court. * * * 'This court has so often affirmed the right of the state in the exercise of its police power to place reasonable restraints, like that here involved, upon the freedom of contract, that we need only refer to some of the cases in passing.' These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be affirmed."

To the same effect the court defined the power of the city to fix rates under the constitutional provisions of the state of Washington as follows in the case of *Puget Sound Traction, Light & Co. v. Reynolds*, 244 U. S. 574, 61 L. ed. 1325, 37 Sup. Ct. 705, P. U. R. 1917F, 57, 5 A. L. R. 13: "Assuming (what is not clear) that the provision in the franchise ordinances respecting the rates of fare and the transfer privilege are contractual in form, still it is well settled that a municipality can not, by contract of this nature, foreclose the exercise of the police power of the state unless clearly authorized to do so by the supreme legislative power. The Constitution of Washington, article 12, section 18, requires the legislature to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination in

rates by railroads and other common carriers, and provides that 'a railroad and transportation commission may be established, and its powers and duties fully defined by law.' By article 11, section 10, any city containing a population of twenty thousand inhabitants or more is permitted to frame a charter for its own government 'consistent with and subject to the constitution and laws of this state.' This constitution was adopted in 1889, long previous to the date of the earliest of plaintiff's franchise ordinances. The Supreme Court of Washington has held that the provisions of municipal charters are subject to the legislative authority of the state; that the Public Utilities Act superseded any conflicting ordinance or charter provision of any city; and that contractual provisions in franchises conferred by municipal corporations without express legislative authority are subject to be set aside by the exercise of the sovereign power of the state. *Ewing v. Seattle*, 55 Wash. 329, 104 Pac. 259; *State ex rel. Webster v. Superior Ct.*, 67 Wash. 37, 43-50, L. R. A. 1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78."

Where the municipality has the power to grant franchises in which there is no expressed limitation as to time, they will be treated as grants in perpetuity, and under its police power the city may regulate the rates and the character of the service, which the court will sustain so long as the rates fixed are reasonable, as is indicated in the case of *Westinghouse Electric & Mfg. Co. v. Denver Tramway Co.*, 3 Fed. (2d) 285, where the court said: "Public rights in the use of a public utility can not be detrimentally affected by the duration of the grant, where, as here, it is not exclusive and monopolistic. If affected at all, permanency would rather be to public advantage. The city possesses at all times the police power to regulate the amount of fares to be charged and the character of service to be rendered, so long as those regulations provide a fair return on capital investment and its preservation unimpaired. * * * The terms used in both ordinances 1885 and 1888 are appropriate to grants in perpetuity. There are no express limitations and no language is used from which an implication can arise that a less estate was intended than the general terms signify. The nature of the transaction, its purpose, its permanent character, and the investment required of the grantees repel an intention by either grantor or grantee that they were revocable licenses or easements at the will of the grantor, nor can any expression be found in either ordinance supporting a claim that the rights granted were to be for a term of years. * * * Plainly, the passage

and acceptance of this ordinance in no way restricted or affected the rights of the Tramway Company which it had under the Ordinances of 1885 and 1888. They were all expressly reserved to it, and in my judgment the perpetual easements granted by those two ordinances, now held under assignment by the Denver Tramway Company, remain unaffected by the Ordinance of May 15, 1906."

§ 538. Rates fixed by agreement of parties binding.—The contractual power of municipalities to impose regulations in the matter of rates to be charged for gas when the company agrees to accept the same, and by so doing enters into a contract of its own motion, is further defined and established in the case of *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822, decided in 1903. This was an action to restrain the violation of a contract under which the appellant company was given authority by the respondent city to maintain and operate a natural gas system in said city and to supply gas at not to exceed the maximum rates stipulated in said contract. To the defense of said company that such contract was ultra vires the city and therefore void because no power was vested in it to enter into such a contract fixing the rates to be charged its inhabitants for gas, the court held that, since the company had continued to use the streets of said city for the distribution of natural gas to private consumers by virtue of such contract, it was not within the power of the company to deny the right of the city to enter into such a contract. But in the course of its opinion the court expressed the belief that there was no lack of power in the city to make such a contract, saying: "Natural gas is a public utility that can not be obtained by the citizens of a municipality generally, except as it is conducted in pipes along the public ways of the city. The grant of exclusive power to the common council over such ways comprehends the right to permit gas companies to use the streets. If the common council may permit a natural gas company to use the streets without any condition annexed, except such as the law attaches, it is not perceived why, as in this case, in making provision for supplying natural gas to all of the inhabitants of the city, it may not protect such inhabitants against extortion by providing that the company shall not charge in excess of certain prices for its service. * * * It was not limited alone to the granting of this franchise, but it had the right to prescribe and impose terms and conditions. When these terms and conditions * * * were accepted * * * it became a binding contract."

To what extent the city has power to insist on stipulations, regulating rates or fixing the maximum price which might be charged by a company for its gas, in negotiating a contract for the granting of a franchise to such a company when it refuses to accept such stipulations and be bound in the matter of rates, this case does not decide. And while the expressions in the opinion above set out would indicate that the attitude of the court favors the holding that such power belongs to the municipality, even when no express authority has been delegated to it to fix rates, this position was not necessary to the decision of the case and so can not be regarded as having the authority of law. While there is good reason for holding the city to have the power to prohibit the charging of excessive rates in connection with the granting of its franchise just as the courts will enjoin the company from making extortionate charges for its service, it is submitted the city can not from time to time regulate the rates to be charged under the mere general authority to regulate the use of its streets. To permit them to do so would have the effect of denying the validity of the well-established principle that such power belongs to the city only when the grant of it is found to have been made by the legislature expressly or by necessary implication. The court limits the application of its remarks, however, by saying that "municipalities can not, under existing legislation, exercise the legislative power to fix rates in any case."

This principle is further discussed and its application more clearly defined in the case of *Rushville v. Rushville Natural Gas Co.*, 164 Ind. 162, 73 N. E. 87, 3 Ann. Cas. 86, which was decided in 1905. The appellee in this case was in occupation of the streets and public places of the city of Rushville, and was supplying the inhabitants with natural gas, under a franchise granted for that purpose by an ordinance of said city passed in July, 1889, known as No. 26, which imposed no restrictions or limitations upon said appellee with respect to the rate to be charged consumers for such gas, or as to the method by which the price should be ascertained and fixed. In August, 1890, the appellant city duly passed another ordinance, known as No. 30, granting generally to any corporation, firm, company or individual a franchise to supply said city and its inhabitants with natural gas upon compliance with certain terms and conditions. And in May, 1899, said city passed a third ordinance known as No. 73, amending said ordinance No. 30 by providing for the use of meters for the measurement of the gas consumed and limiting the charge therefor to fifteen cents per thousand feet. The action in the

case was brought by the appellant to enjoin the appellee from increasing its rates and charging consumers of natural gas in excess of the maximum price fixed by the provisions of said ordinances Nos. 30 and 73. The court stated the principle in question in the following decisive language: "Appellee accepted the provisions of this ordinance [No. 26], adjudged and conceded to be valid, and constructed its plant at a cost of \$100,000, to fulfill the purpose of its creation. The acceptance by appellee of the privileges granted by appellant in this ordinance constituted a contract equally binding upon both parties, and when acted upon rights became vested, and its provisions became secure against impairment by any subsequent municipal action. * * * This ordinance did not prescribe any limits as to charges for gas, or reserve to the city the right thereafter so to do. No alteration of or addition to the terms of the contract thus formed could be made afterwards by either party without the consent of the other. * * * It is now the settled law of this state that, under such circumstances as shown here, cities have no authority or power by subsequent ordinance or action, to impose any additional restrictions regulating the price to be charged for gas furnished under such contract."

The case of *Richmond v. Richmond Natural Gas Co.*, 168 Ind. 82, 79 N. E. 1031, 11 Ann. Cas. 746, decided in 1907, was a suit for an injunction to prevent the defendant company from charging a greater rate than that provided in an ordinance, which the plaintiff city had passed, after the defendant had installed its plant under a franchise which did not attempt to fix or control the rate to be charged, and, as the state had not expressly delegated to the municipality the power to fix or regulate the rates, the court, in refusing to sustain the injunction, held the ordinance attempting to fix the rate invalid because beyond the power of the city and because it was an unconstitutional attempt to impair the property rights of the defendant company. This case represents a practice all too common and shows the folly of the municipal corporation in failing to regulate and fix the rate in connection with the grant of its consent to the municipal public utility to use its streets. In the course of its opinion the court said: "Where a franchise to supply gas is granted without restriction as to prices, accepted, and acted upon, cities, incorporated under the general law of this state, had no authority prior to 1905, by subsequent ordinance or action, to impose additional provisions regulating prices to be charged for gas furnished under the original franchise. * * * The general assembly of

1905, in revising the statutes governing cities and towns, conferred upon cities the following among other powers: '(36) To license and regulate the supply, distribution and consumption of artificial and natural gas, electricity, heat and water, and to fix by contract or franchise the prices thereof, etc.' * * * The statute relied upon purports to empower a city of the class to which appellant belongs to fix prices only 'by contract or franchise.' When the manner in which a delegated power is to be exercised is prescribed, it must be substantially followed. * * * The ordinance under consideration is without any of these characteristics. It neither grants a new right, nor confirms or extends an existing one, but merely seeks to impose special restrictions upon an existing right to the use of the streets and alleys of the city. * * * In the absence of charter authority or other statutory or constitutional provisions, delegating the power in express terms or by necessary implication, it is the rule that a municipal corporation has no power to fix by ordinance the price at which a gas company shall supply its customers.²⁰ * * * In this case it appears that the attempted regulation of prices was not done by contract, or in connection with the granting or acceptance of a franchise, and the legislature has not delegated to appellant whatever authority to regulate prices of gas it may possess in the premises, to be exercised in any other manner. It follows that the ordinance relied upon is invalid as against appellee."

The early case of *Mills v. Chicago*, Illinois, 127 Fed. 731, decided in 1904, was an action to restrain the enforcement of an ordinance of the defendant city forbidding manufacturers from demanding more than seventy-five cents per thousand cubic feet for gas served to their customers, which was a marked reduction from the prevailing price of gas. In refusing to find such power in the city to regulate the rate for gas supply the court said: "No one has pretended that the regulation of the price of gas is essential to the specific object for which the city of Chicago was created. * * * It is plain to me that the sixty-sixth section, while granting power to regulate the police of the city or village, can not be enlarged to include power to regulate the price of gas. * * * The mere laying of gas pipe, and the installation of gas plants, together with their repair, are the subject-matter of a power widely separable in circumstances from the power to deal with the rates at which gas shall be manufactured and sold. The

²⁰ 20 Cyc. 1166, and cases there cited.

first belongs naturally to the city whose streets are to be occupied, for it is related intimately with the supervision of streets; the latter, with equal reason, is foreign naturally to the city. * * * Until there is legislation, more unmistakable than the language used in this section, to indicate a purpose to grant the city power to fix rates, I shall not hold that such was the legislative intent. Unquestionably the power resides somewhere in the state, but until consciously delegated to some other body, it remains in the state's general repository of power, the general assembly of the state."

Until the state through its railroad commission attempts to fix or regulate rates, the franchise or contract rate continues to prevail, subject to the continuing right of the state to change it, as is indicated in the case of *Coulter v. Sausalito Bay Water Co.* (Cal.), 10 Pac. (2d) 780, where the court said: "Although the distribution and sale of water to the public is subject to regulation and control by the state, and this notwithstanding contracts for such sale have been entered into (*Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213; *Limoneira v. Railroad Commission*, 174 Cal. 232, 162 Pac. 1033), nevertheless until public authority has intervened and modified prior contracts the same will be recognized and enforced. *Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, 159 Pac. 865, L. R. A. 1917E, 680. And this is true although the system and water of the company have been dedicated to a public use. *Fresno Canal Co. v. Park*, 129 Cal. 437, 62 Pac. 87. In the present case there is no evidence of an attempt to fix or regulate the rates of the water company by any public authority, and so far as shown the contract was valid."

On the consolidation or merger of public utility companies, the rate prevailing for the territory prior to the merger continues to control the new company until changed by the public service commission, for as the court said in the case of *Alabama Power Co. v. Patterson* (Ala.), 138 So. 421: "What were the duties and obligations of the new consolidated corporation, which we might term the 'new Alabama Power Company,' with reference to supplying lights to the city of Mobile? It was to carry out the obligations existing between the city and the one of the old companies that was merged into the new corporation, that is, the Gulf Company, and, this being so, it was for the rate as then existing between the city and said Gulf Company until changed by the public service commission and which was the existing rate for the year 1928. The old Alabama Power Company was

not, at the time, obligated to serve Mobile, but the Gulf Company was, so the liability or duty of the new company was to assume the obligations of the Gulf Company. For instance, had the rate existing between the city of Mobile and the Gulf Company, at the time of the consolidation, been lower than the one fixed by A 3, as applicable to the Alabama Company, we would not hesitate to hold that the new consolidated company was obligated to serve the city at the rate fixed for the Gulf Company instead of the higher rate fixed by A 3. * * * If, since the consolidation of the companies, the conditions have become so identical or similar that these places should enjoy the same rate, redress should be first sought through the public service commission. The court of appeals erred in holding that rate A 3, instead of the rate that was charged, was the proper rate, and in affirming the judgment of the circuit court."

§ 539. **Police power.**—Unless the constitution of the state so provides and its statutes expressly authorize municipalities to make contracts and fix rates for rendering public utility service in granting franchises for that purpose, a contract so made which is beyond the limits of such constitutional and statutory provisions is not binding as to rates, and they may be changed by the state in the exercise of its sovereign police power. A leading case defining this principle is that of *State v. Public Service Comm.*, 275 Mo. 201, 204 S. W. 497, P. U. R. 1918F, 762, wherein it was said: "Section 5, article 12 of the Missouri Constitution reads: 'The exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the state.' * * * Under such a constitutional restriction, the legislature would be powerless to enact a valid law by the terms of which the right of the state in the exercise of the sovereign police power in the fixing of reasonable rates for public services could be limited or abridged. * * * It was under similar definitions of police power that this court held that the fixing of reasonable rates for public service is the exercise of the sovereign police power of the state. Such power can not be contracted away, nor can the legislature of the state authorize a municipal corporation to contract away the police power of the state. It is clear that the legislature can not confer more power upon one of its creatures (municipal corporations) than it possesses itself. The legislature is prohibited by the constitution from abridging the police power of the state."

However the power of municipalities to fix rates in franchises and by contract for furnishing public utility service varies with the constitutional and statutory provisions of the several states and in construing such power in connection with the police power the federal courts agree that the question is determined by the decisions of the state courts. As the Supreme Court of the United States held in *St. Cloud Public Service Co. v. St. Cloud, Minnesota*, 265 U. S. 352, 68 L. ed. 1058, 44 Sup. Ct. Rep. 492: "It has been long settled that a state may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates."²¹ * * * And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial. * * * In construing and giving effect to these provisions of the charter we look to the decisions of the Supreme Court of the state. * * * In the light of these decisions of the Supreme Court of the state of Minnesota we think it is clear that the city had authority, in 1905, under its charter and the laws of the state, to enter, by ordinance, into a contract, in its proprietary capacity and for the benefit of its inhabitants as well as itself, providing for the construction and operation of gas works for a period of thirty years and fixing the rates to be charged for gas to it and its inhabitants. * * * And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended and the contract is binding.²² * * * The city clearly, could not avail itself of this statute to reduce the gas rates below the maximum prescribed in the contract of 1905; and the company, conversely, can not under it obtain higher rates. The contract is binding on both parties alike."

This principle defining the effect of the police power in rate regulations is reaffirmed in the case of *Alaska Electric Light & Co.*

²¹ *Home Tel. & T. Co. v. Los Angeles, California*, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. 50, and cases therein cited.

²² *Paducah, Kentucky v. Paducah R. Co.*, 261 U. S. 267, 273, 67 L. ed. 650, 651, 43 Sup. Ct. 335.

Co. v. Juneau, Alaska, 294 Fed. 864: "But this is far from saying that there is necessarily included, in the power to provide lights for a city, the power to enter into a binding contract whereby the rates to be charged by a public utility corporation shall be irrevocably fixed. The existence of such a right to establish fixed rates for a definite period depends upon the question of whether or not the police power of the state has been delegated to the municipal corporation. * * * We may follow the conclusion which the court reached in that case, and say that the appellant here has failed to show that in 1908 the city had legislative authority to make a contract fixing rates for a definite period of time, so as to preclude its power to alter the same."

The force and effect of the police power in the matter of fixing and regulating rates is well stated in the case of Alabama Water Co. v. Attalla, 211 Ala. 280, 100 So. 490: "The discussion of the subject may be concluded by the general observation that the power of a reasonable regulation and to fix reasonable rates of public utilities falls within the exercise of the police power; a power lodged with the legislative department and agencies created by it to which that power may be and is delegated. The police power of the state can not be abridged or suspended by contract between citizens of the state, or between the municipality (a mere agent of the state) and a citizen thereof. It follows that the increase of the contract rates for water supplied to the inhabitants of the city of Attalla by the Alabama public service commission was not in violation of the contract clause of either the state or federal constitution, the increased and substituted rates not being unreasonable."

Contracts between municipalities and public utilities, fixing the rates for service, may be abrogated by the state through its public utilities commission, with which the state has lodged this power of regulating rates, for as the court said in the case of Elliott v. Empire Natural Gas Co., 123 Kans. 558, 256 Pac. 114, P. U. R. 1927D, 751: "The commission had authority to fix the rates to consumers in the city of Wichita and other municipalities on the lines of the pipe line company, even though in so doing it abrogated contracts between the municipality and the distributing company. See City of Winfield v. Court of Industrial Relations, 111 Kans. 580, 207 Pac. 813; Id. 263 U. S. 680. In the Winfield Case it was pointed out that the city is a creature of the state, whose destiny as to its public utilities has been intrusted to an agency of the state—i.e., the public utilities com-

mission. So far, therefore, as the city of Wichita was concerned, the jurisdiction of the commission was complete."

Where a municipality has the power by statutory enactment to fix rates for public utility service after the circuit court has certified its judgment on the subject, an appeal from the judgment of the circuit court does not suspend the right of the municipality to fix the rates immediately, for as the court said in the case of *Coal District Power Co. v. Booneville*, 169 Ark. 1065, 278 S. W. 353: "This is a continuation of a suit between appellee and appellant herein, the purpose of which was to fix and promulgate rates for electrical energy to be furnished by appellant, to the consumers of the city of Booneville. The rates were fixed by the city of Booneville pursuant to authority conferred by Act 124 of the Acts of the General Assembly 1921. * * * A careful reading of these two sections leads us to the view that the legislature intended to authorize the circuit court to immediately certify its judgment fixing the rates to the city council, and to empower the council to adopt such rates at once, with the privilege of appeal within thirty days, in which event the penalty provided in section 24 should not attach until the appeal was finally disposed of. The act provides that, when the judgment of the circuit court is certified to the council, it 'shall thereupon fix such rates as shall be in conformity with the finding of the court.' * * * The statute requires that the penalty sued for in this case can not be imposed until the appeal from the circuit court's judgment fixing the rates has been finally disposed of. Appellant contends that the appeal was not finally disposed of until the mandate of the Supreme Court was filed in the lower court. We can not agree with the learned attorney for appellant in this contention. The judgment of the circuit court was affirmed and became final after the time expired for filing a motion for rehearing. There was nothing further for the trial court to do."

Where the municipality has a continuing right to regulate rates for public utility service, a franchise is accepted subject to this reservation, which may be acted upon at any time by the municipal authorities, but is not a proper subject for a referendum, although most municipal ordinances are subject to this right, for as the court said in the case of *Dallas R. Co. v. Geller*, 114 Tex. 484, 271 S. W. 1106: "The right or power to further control or regulate the grant in regard to the rate schedule is a reservation to the municipality, and not an inhibition to contract; and, where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract. The

matter of changing, fixing, or regulating the charges, fares, or rates of a public service company or corporation, and of determining what the compensation for such service should be and its reasonableness, is both legislative and judicial in character, and in its nature one which is at least impracticable, if not impossible, for the public at large, the voters, to pass on. They can not have or digest the information, data, and facts necessarily incident and essential to the forming of a correct, accurate, and fair judgment upon the subject. Under proper construction of the charter, the city of Dallas does not provide for referendum on rate schedules. True, the referendum provision is broad, and provides generally for referendum of ordinances, but that provision must be construed in connection with the plain and specific provision relating to the fixing and regulating of rate schedules so as to give effect to its plain and specific requirements."

Although a city may have fixed a rate in its franchise, this is subject to change in the exercise of its police power, especially where the right to regulate is reserved in the franchise, and an ordinance changing the rate will be upheld in such a case, for as the court said in the case of *Camden Gas Corp. v. Camden* (Ark.), 41 S. W. (2d) 979: "When this section [Acts 1921, No. 124, § 17] is read into the contract, the contract itself provides for a reduction of any unreasonable rate theretofore fixed by ordinance. The passage of Ordinance No. 303 reducing the rate was within the reservation and right of the original or charter contract, and, on that account, did not impair the obligation of the contract. * * * In those cases it was ruled that the right to regulate or alter rates agreed upon between public utilities and municipalities is an inherent attribute of police power or sovereignty existing in the state, which may be exercised at any time through any state agency for the purpose of establishing just, equitable, and reasonable rates, and this attribute of sovereignty can not be contracted away by the state or its agencies. Such contracts must be made in full recognition of and subject to the sovereign power as much so as if such a reservation were written into the body of the contract. Ordinance No. 303 is not, therefore, void as impairing the obligation of a contract."

That the public service commission, acting for the state in the exercise of its police power, has the power and authority to fix and determine reasonable rates for public utility service, regardless of any existing contracts between such companies and their customers or any municipalities of the state, is the rule adhered to by the courts of Missouri in a long line of cases, one of the

leading ones being that of *State v. Trimble*, 307 Mo. 536, 271 S. W. 43, where the court expressed the rule as follows: "In *State ex rel. Sedalia v. Public Service Comm.*, 288 Mo. 411, 231 S. W. 942, it was held that the fixing of rates for service to be rendered by public utilities is an exercise of the police power of the state, and that the commission has the right and the power to fix reasonable rates irrespective of existing contracts between such utility and the city. * * * When the service company filed with the commission its contract and schedule fixing rates for service and charges for maximum demand, such rates and charges became effective under the provisions of the statute, and were binding upon the service company and the milling company, irrespective of any private contract between them. * * * To assert the right to have a new contract made is to deny the right of the commission to fix reasonable rates and charges regardless of existing contracts. * * * The service company had the right thus to measure the maximum demand, independent of the consent of the milling company. No order of the commission was necessary, because the schedule of the service company already on file with the commission authorized it to measure the maximum demand and to charge therefor on that basis."

An interesting modification of this rule, however, is furnished by the decision of the federal court from this jurisdiction where the court, appointing the receiver, fixed the rate for the public utility service, and, while this was not binding on the public generally, for, as the court said, they could "take it or let it alone," all who accepted the service under this condition were held liable to pay the rate fixed by the court on the theory of implied contracts. This principle and the reasoning on which it is based are established in the case of *Landon v. Kansas City Gas Co.*, 10 Fed. (2d) 263, P. U. R. 1926D, 756, where the court expressed the rule as follows: "In this case the receiver was bound by that order. He had neither power nor authority to furnish gas at a rate less than that fixed by the court; of this the distributing companies had full notice, and for that purpose the proceedings at the hearings, in which the gas companies participated, were evidentiary. * * * It is true that he might have shut off the gas, if permitted by the court so to do. He did not apply in this case for such permission, but, as has been shown, but two months before the hearing which resulted in the thirty-five-cent rate, the court had declined to grant such permission under similar conditions, and the receiver was not bound to make further application in view of

this circumstance. We do not think such a drastic measure should have been required, in view of the nature of the service rendered. * * * The court in charge of the receivership had power to determine the price at which it would sell its product. The receiver tendered the gas at a fixed rate, which he had no power to modify; this the distributing companies understood. In homely phrase, they could 'take it or let it alone.' If they accepted the gas and its beneficial use, they did so with the implied promise raised by law to pay the only rate which they knew was or could be charged. * * * The suits were upon implied contract, and the theory is that the gas was furnished and accepted under conditions known to exist which raised such an implication. The situation presented was tantamount to that of a legal obligation paramount to the will of the distributing companies. With full knowledge they accepted gas from an officer of the court, who was charging a rate from which he had no power to depart. Acceptance under such circumstances implied the promise to pay at that rate."

§ 540. **Public utility commissions.**—The control of state commissions over the matter of rate regulations is well expressed in the case of *United States v. Oklahoma Gas & Electric Co.*, 297 Fed. 575, as follows: "Further it is sound law that parties by contract can not take from such commission the right granted it by a state to fix rates on service furnished by public utilities. If by contract the commission could be prevented from increasing rates, then likewise by contract it could be prevented from reducing them, and the regulation of the commission set up and authorized by the legislature to regulate rates of public utilities would be futile. * * * The trial court was correct in holding that the contract, as to rates, was subject to the decisions made by the corporation commission changing the same."

On the finding of the court that the rate fixed by the commission is unreasonable it becomes the duty of the commission to fix other rates, for as the court said in the case of *Cincinnati & Suburban Bell Tel. Co. v. Public Utilities Comm.*, 107 Ohio St. 370, 140 N. E. 86, P. U. R. 1924A, 739: "Both the utility and its patrons would have been entitled to have the judgment of the public utilities commission upon that subject, and if by reason of changed issues, or for any other cause, it were necessary for the commission to have further facts upon which to exercise such judgment it would have been the duty of the commission to secure such facts, either by its own initiative or by giving the parties interested an opportunity to produce evidence thereof.

Therefore, when the order of the public utilities commission was reversed by this court, and the cause remanded generally for further proceedings according to law, the cause came again before the public utilities commission for the exercise by it of its judgment, and, if the record before it was not sufficient to enable it to intelligently exercise such judgment, it was its duty to either itself supplement that record or permit the parties interested to make such supplement, and then base its conclusion upon such record."

That the public service commission has jurisdiction to fix and determine rates is well expressed in the case of *Bellevue v. Ohio Valley Water Co.*, 245 Pa. 114, 91 Atl. 236, which is one of the early decisions on the subject, as follows: "If the case in any of its aspects involves the reasonableness or unreasonableness of water rates, it is a sufficient answer to say that the section of the act of April 29, 1874 (P. L. 73), which gave courts the power to determine questions of this character, was repealed by the Public Service Company Law, approved July 26, 1913 (P. L. 1374). In other words, the legislature took this power away from the courts and conferred it upon the public service commission. Hereafter, so long as the act of 1913 remains in force, the question of the reasonableness of rates established by public service corporations must, in the first instance, be submitted to the public service commission when challenged. This is now the declared statutory policy of the law, and it is binding not only upon the interested parties, but upon the courts as well. * * * The contract in question was made in 1896, and by its terms the water company was granted the right to lay pipes and mains in the streets of the borough with the stipulation that certain specified rates should be charged the borough and the inhabitants thereof for water furnished. The contract as to water rates is unlimited in time, being coextensive with the grant. Is such a contract binding in the face of the declared statutory policy of the law that the public service commission shall have the power to inquire into and determine the reasonableness of rates in all such cases? This question was answered adversely to the contention of appellants in *Turtle Creek Borough v. Pennsylvania Water Co.*, 243 Pa. 415, 90 Atl. 199. We did not then decide whether a contract between a borough and a water company, for a definite term of years and for specified rates during the limited term, would be enforced as between the parties, because that question was not then raised; and it is not raised now, so that this will be left as an open question until it is presented in concrete form

upon facts calling for a decision of the point. We did decide in that case that a contract of this kind, unlimited by its terms, and hence indeterminate as to time, could not be enforced indefinitely, and must give way to the general policy of the law under which the legislature created a special tribunal to pass upon and determine questions relating to the reasonableness of rates charged by public service corporations. The learned court below in the present case very properly followed the decision in that case and held that the borough of Bellevue could not enforce through the courts a compliance with the rates thus established. It is not a continuing binding contract enforceable through a court of equity. This is so, not because the courts have any desire to avoid the performance of duties cast upon them by the law, but because the people, speaking through the legislature, have declared that these duties shall be performed by a special tribunal created for the purpose. The disposition everywhere is to commit questions relating to the regulation, and to the rates of public service corporations, to the supervisory powers of special tribunals, and concededly matters of this character are within the domain of legislative action. We agree with the learned court below that the public service commission is the only tribunal that has the power, as the law now stands, to give the complainants the relief prayed for in the present bill, if such relief be deemed proper."

To the same effect in defining the power of state commissions to regulate rates the court in the case of *Woodburn v. Public Service Comm.*, 82 Ore. 114, 161 Pac. 391, L. R. A. 1917C, 98, Ann. Cas. 1917E, 996, P. U. R. 1917B, 967, said: "When examining the contention urged by the municipality, we must not lose sight of the fact that the right to regulate rates by changing them from time to time as the welfare of the public may require is essentially a police power; and, since the right to regulate rates is an inherent element of sovereignty, when seeking to ascertain whether this part of the police power has been conferred upon the city, either with or without limitation, we are constantly governed by the rule that the delegation of the sovereign right to regulate rates must be clear and express, and all doubts must be resolved against the city. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176; *Milwaukee Elec. Ry. v. Wisconsin R. R. Com.*, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. ed. 1254; *Benwood v. Public Service Commission*, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261; *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C,

287, Ann. Cas. 1913D, 78; *City of Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 129 N. W. 925. * * * The right of the state to regulate rates by compulsion is a police power, and must not be confused with a right of a city to exercise its contractual power to agree with a public service company upon the terms of a franchise. The exercise of a power to fix rates by agreement does not include or embrace any portion of the power to fix rates by compulsion."

The railroad commission of California has the power to regulate the service and rates of public utilities under the constitution of the state, and such contracts between the public utility and its consumers are subject to this regulation, as is indicated in the case of *Sutter Butte Canal Co. v. Railroad Commission*, 202 Cal. 179, 259 Pac. 937, P. U. R. 1928A, 811, where the court said: "The controlling question in the proceeding is, therefore, the extent of the power that may be exerted by the railroad commission upon the contracts between petitioner and the contract consumers. The police power is one of the attributes of state sovereignty and can not be limited by contract. It operates upon property and property rights, including contracts, to the extent necessary for the protection of the public health, safety, morals, and welfare. To the railroad commission has been committed the execution of this power over public utilities in California. * * * If the commission may not relieve this discrimination, then it must follow that since 1918 every new consumer has been illegally admitted to water service as such consumer was not required to sign a contract for perpetual service. For if the commission may allow a dedication of service to a new consumer without demanding of him a perpetual obligation, then it must follow that it has the power to remove discrimination thus created between the two classes of consumers. The legality of this dual classification has already been sustained by this court. * * * But it must follow that if, in fixing rates, or in removing discrimination, the duration of the contract relationship is encountered, it must yield to the regulatory power lodged by the constitution in the commission even to the extent of out and out termination or release of such contract. * * * If it is within the power of the commission to require a consumer to sign an agreement to pay for three years' service in order to get water for his present year's needs it must surely be true that the power to add a constructive period to the obligation implies the power to curtail an indefinite period and thus place the two on an equal basis. In other words,

it is clear that it is well within the regulatory powers of the commission to disregard altogether the contracts in so far as they provide for periods of future service and fix a present rate for water actually consumed, and disregard all paternalistic provisions in favor of petitioner at the expense of either class of consumers."

This same court in a later case indicated, however, that the right of regulation remains the same over a contract between an irrigation district and its individual consumers when this is acquired by a municipality, especially as to the rates for water delivered beyond the boundaries of the irrigation district where it had no authority to fix rates. In holding that the relation in the matter of rates was purely contractual and that the right to regulate the rate was not affected by the transfer of the property and contract to a municipality, this court in the case of *San Diego v. La Mesa, Lemon Grove &c. Irr. Dist.*, 109 Cal. App. 280, 292 Pac. 1082, said: "The railroad commission neither had authority over this rate during the time the utility continued to receive water from the district, nor do we think any change in the authority to fix the rate was worked by the sale from the utility to the city. The city of San Diego, as such, would not have authority to fix the purchase-price of water thus being purchased in bulk for distribution to individual consumers. * * * We find neither in these sections nor elsewhere any specific authority given to an irrigation district to fix or establish rates for water sold or delivered outside its own boundaries, in disregard of or irrespective of such a contract as we now have under consideration under which a district has acquired practically an entire system upon the condition of continuing to furnish water for the benefit of ultimate consumers in a portion of the territory theretofore served by the water system thus acquired. Such water is in no sense of the word surplus water. * * * While the fixing of the rate we are considering might have been left to the irrigation district, it was, in fact, fixed by an agreement between the district and its customer. We are unable to see that the situation, as thus established, was changed by operation of law by the later transfer of this agreement from the public utility to the city of San Diego, especially in view of the fact that this transfer was consented to by the district with full knowledge of the facts. * * * We think, therefore, that the relationship between the parties hereto is purely contractual, and that the appellant irrigation district did not become, by operation of law, the 'competent authority' referred to in the option.

* * * This party had theretofore been subject to the regulation of the railroad commission, and while allowance was thus made for the fact that this regulation would cease, in so far as this rate was concerned, and for possible future changes in the law as affecting the rate-fixing authority it is apparent that the very thing the utility was trying to do was to protect itself from such an arbitrary raise in rates by the irrigation district as is now attempted. And to this protection the other party agreed."

Municipal ownership of a public utility does not relieve it from the power of regulation and control by the railroad commission of the state, which is expressly given this power by the legislature, nor will the court sustain a classification of municipalities according to their population in the matter of fixing rates, because this is held to have no reasonable relation to the question. In holding that the railroad commission has this right of regulation, although it was created after the municipality had acquired its plant, at which time the municipality itself fixed its own rates and regulated its service, the court in the case of *Pabst Corp. v. Milwaukee*, 190 Wis. 349, 208 N. W. 493, P. U. R. 1926 D, 290, said: "But there is no need to resort to the practical construction given this law in its administration, because the act so clearly expresses the legislative intent to declare that every municipal water plant is a public utility subject to the regulation and control of the railroad commission. There is nothing in section 371.09 or 371.10 of the statutes which places the Milwaukee plant outside the pale of regulation by the commission. * * *

After the passage of the utility law, the city still had the power to initiate changes in its water rates, just as the directors of a private utility had the power to initiate new rates. But such rates, when initiated by a city or by a privately owned utility, are not effective unless the ten-day notice of the proposed change in rates is given to the railroad commission as required by section 196.20 of the statutes. The fact that the city of Milwaukee owned and operated its water plant when the public utility law was passed in 1907 does not exempt this municipal plant from regulation by the commission. * * * Any attempt to classify cities according to population with reference to the making of rates must fail because it is not based on characteristics legitimately distinguishing the members of one class from those of another with respect to the public purposes sought to be accomplished in the establishment and regulation of utility rates. *State ex rel. Milwaukee, etc., Co. v. Railroad Commission*, 183 N. W. 687, 174 Wis. 458, 465. Nearly twenty years of regulation of

utility rates by the railroad commission has demonstrated the wisdom of the legislative plan of subjecting the rates of all utilities, whether publicly or privately owned and operated, to the supervision and control of the railroad commission, aided by its staff of experts whose accumulated knowledge with reference to the problems connected with the fixing of rates has been one of the chief factors that has stabilized rates in Wisconsin and tended to make them just and reasonable both to the public and to the utility. The lack of such expert technical knowledge on the part of those who acted for municipalities in establishing rates before the passage of the utility law was one of the chief reasons which led the legislature to take the regulation of rates out of the hands of municipal authorities and to vest that power in the commission. * * * In fixing the rates to be charged to the citizens of Milwaukee, the common council was acting for the city in its private or proprietary capacity. The fixing of the rates was a necessary part of the business management of the private or proprietary undertaking on which the city embarked when it established its own water plant."

In a later case this same court indicated that, pending the hearing before the commission as to the reasonableness of the rate, the court was not obliged to issue an injunction suspending the operation of the proposed rate because this was a matter resting in the discretion of the court, which spoke as follows on the subject in the case of *J. Greenebaum Tanning Co. v. Railroad Commission*, 194 Wis. 634, 217 N. W. 282: "It appears that the city of North Milwaukee, formerly the village of North Milwaukee, has since 1902 been supplied with water for its distribution system by the city of Milwaukee at the agreed compensation of six cents per one hundred cubic feet. The arrangement between the city of Milwaukee and the village, now city of North Milwaukee, was never reduced to a formal written contract, but no significance is attached to that fact. It appears from the pleadings that on December 9, 1926, the railroad commission made an order fixing the compensation at ten cents per one hundred cubic feet instead of six cents, and thereafter an order readjusting the rates in the city of North Milwaukee, of which complaint is made, was entered on January 12, 1927. * * * Under the statute, the order of January 12, 1927 is a valid and subsisting order until set aside in the manner prescribed by statute, whether the order of December 9th is valid or not. The only inconvenience which the plaintiff will suffer by reason of not being granted an injunction pending the action is that it will have to pay the pre-

scribed rate under protest, which, if found to be unlawful, it will have to recover from the city of North Milwaukee. On the other hand, if the order of January 12, 1927, is found to be valid, the city could be deprived of its additional revenue or at least it would be rendered very difficult of collection. Whether or not a temporary injunction shall issue is a matter largely within the discretion of the trial court. * * * It is considered that the trial court did not abuse its discretion in denying plaintiff's motion for a temporary injunction."

Under the constitution of North Carolina, municipal contracts for public utility service are subject to the regulation and control of the corporation commission of the state, and when rates are determined by it, they will be presumed to be reasonable and just, as is established in the case of *Corporation Commission v. Henderson Water Co.*, 190 N. Car. 128, 70 S. E. 465, where the court said: "Petitioner is a public service corporation, and the corporation commission is vested by law with full power and authority to fix and establish any and all rates which it may charge for services rendered by it. C. S. 2783. When the corporation commission is called upon, by either the corporation or those to whom the services are rendered, under its franchise, to exercise this power and authority, it is its duty to fix and establish just and reasonable rates to be charged for such service. The rates or charges established by the commission shall be deemed just and reasonable. C. S. 1067. The burden was therefore upon appellant to offer evidence sufficient for the jury to find, upon appeal and under the instructions of the court, that the schedule of rates established by the commission in this case were not just and reasonable to both petitioner and respondent. Upon a careful consideration of the evidence, as set out in the statement of the case on appeal, we must sustain the instruction of the court. * * * The power conferred by its charter upon the city of Henderson 'to provide water and lights, and to contract for same, provide for cleansing and repairing the streets, regulate the market, take proper means to prevent and extinguish fires,' is subject to the police power of the state, with respect to rates to be charged under such contracts as the city may make under its charter with a public service corporation. Constitution of North Carolina, article 7, sections 12, 14; article 8, section 2."

Where the public service commission has the power to regulate rates, existing rates remain effective until another is ordered by the commission in accordance with the statutory provisions; but the fact that a certain rate was in effect when the defendant

purchased land which was being served does not in itself give the purchaser any right to a continuance of this rate, for as the court said in the case of *Empire National Gas Co. v. Thorp*, 121 Kans. 116, 245 Pac. 1058: "The defendant contends that, as a purchaser of a part of the land, he is entitled under the contract to have gas furnished to him at twenty-seven cents per thousand cubic feet; that twenty-seven cents was the rate in effect when the Public Utilities Law was passed and the legal rate to the defendant, and that the rate of twenty-seven cents per thousand cubic feet was reasonable. * * * The defendant did not acquire the right to have gas furnished to him at twenty-seven cents a thousand cubic feet by virtue of his being a purchaser of two and one-half acres of the land. * * * Here, we have a rate voluntarily put into effect, and over which none of the rate-regulating bodies of this state has attempted to exercise any control. * * * The plaintiff is a public utility within the meaning of that law, and is furnishing gas to the defendant under the law. * * * These statutes apply to the rate in controversy. A schedule of that rate must have been filed to have complied with the law. It can not be changed, except on the order of the public service commission. Until the commission orders otherwise, that rate remains the legal rate for gas to be furnished to the defendant."

A rate established by the railroad commission is applicable to the franchise rather than the physical property of the public utility, so that the purchase by one utility of the plant or equipment of another may have the effect of modifying the rates so as to make them conform to that fixed by the franchise of the public utility making the purchase. This principle is established as follows in the case of *Twin City Pipe Line Co. v. Chambless*, 170 Ark. 418, 279 S. W. 1030, P. U. R. 1926C, 438: "The solution of the question must depend upon whether the rate fixed by the Arkansas railroad commission is personal to a carrier, running with its franchise, or whether the rate attaches itself to the physical properties of each public utility. The rate, in our opinion, runs with the franchise or right of each public utility to do business. In the operation of the business of a public utility, it must adhere to the rate fixed and applicable to it until changed by the Arkansas railroad commission, which fixed the original rate. Act 124, Acts 1921. The purchase of pipe lines owned by other carriers whose rates have been fixed at different amounts by said commission does not automatically modify or change the rates of a purchasing carrier theretofore fixed by the commission

for each public utility. If the domestic consumers along the pipe lines of the selling utilities are not satisfied with the rates fixed for the purchasing utility on account of being exorbitant or unfair, their remedy was to apply to the Arkansas railroad commission for a reduction of the rates."

While all rates are subject to change and any unreasonable rate may be changed on application to the state corporation commission, until such application is made, the rates agreed upon between the parties, including any modification of such rates, continues in effect, for as the court said in the case of *Blackwood Coal & Coke Co. v. Old Dominion Power Co.*, 151 Va. 52, 144 S. E. 439, P. U. R. 1929A, 320: "This makes it manifest that there was by mutual consent an abandonment, rescission, or revision of the original contract, which provided for a rate of one cent per kilowatt hour, and the substitution therefor of an agreement to pay a rate of two cents per kilowatt hour, until another contract should be entered into, and is conclusive. There has never been any later, further, or other contract between the parties as to the rate for the power which has been since supplied. * * *

The plaintiff's claim is based upon its original contract, but no contract with reference to the rates of such public service corporations are valid, unless they provide for reasonable rates, and every such contract as to rate is subject to the sovereign power of the state to prescribe and enforce reasonable rates. This has been so frequently decided that it is no longer necessary to cite authority therefor. The parties themselves, by a subsequent agreement which is clearly proved and admitted, rescinded so much of their original contract as provided for a one-cent rate, and provided instead for a two-cent rate, which was to continue in effect until some new contract as to such rates had been agreed to. There never has been any such new contract, and hence this agreement remained in effect until the rates which were filed with and accepted by the state corporation commission became effective, and this now prevents the making of any new or other agreement as to such rates. Such an agreement would be nugatory. * * *

Here, during the pendency of the matter before the commission, an investigation into the reasonableness of the proposed rates was made. * * *

This binds us for the past, for it can not be doubted, under the facts of this case, that all of these payments were voluntary payments. Indeed, it is difficult to conceive of involuntary payments of rates to public utility companies, because the doors of the state corporation commission are always open to prevent coercion,

oppression, or the exaction of illegal rates. The rates of public utility companies, however established, are never immutable. Conditions change, and a rate which might have been originally legal, because then reasonable, may thereafter become unreasonable and illegal. The jurisdiction of the commission may be at any time invoked for the investigation of all such rates, and for the prescription and enforcement of reasonable rates. The final question in all such inquiries is whether the rate at the time of the inquiry is reasonable or unreasonable. * * * The presumption here, in absence of proof to the contrary, is that all of the rates here charged were and are reasonable, because, first, they were originally suggested by the fuel administration and acquiesced in by the consumers; secondly, because of the voluntary modification of the one-cent contract rate and its increase to two cents made by the plaintiff itself; and, thirdly, because by the investigation made by the coal operators' association and the expert engineers employed by that association, with the acquiescence of the state corporation commission, approved by most of the consumers interested, and paid by the plaintiff for many years before the institution of this action."

The right to regulate rates of municipally, as well as privately, owned public utilities in Indiana is vested in the public service commission, and this probably represents the prevailing plan of regulation, although the matter is statutory and accordingly varies with the provisions of the statutes in the different states. This principle is discussed and decided as follows in the case of *Logansport v. Public Service Comm. (Ind.)*, 177 N. E. 249, 76 A. L. R. 838, P. U. R. 1931E, 179, where the court said: "The regulation of rates to be charged by public utilities is properly the function of the legislative department of the state government, under its police power. Pond, *Public Utilities* (3d edition) 519, 520; *Winfield v. Public Service Commission*, 187 Ind. 53, 118 N. E. 531, P. U. R. 1918B, 747; *Washington v. Public Service Commission*, 190 Ind. 105, 129 N. E. 401, P. U. R. 1921C, 459; *Hockett v. State* (1886), 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Smythe v. Ames* (1898), 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418. * * * In recent cases this court has held that, to safeguard the public interest and promote public convenience and necessity, the right and powers to regulate service, to fix rates and to prevent ruinous and unrestricted competition was given to the public service commission and that the act creating the commission conferred upon it all the powers of control over utilities theretofore enjoyed by municipalities, save and except

such control as was reserved to municipalities over streets. *Stuck v. Beech Grove*, 201 Ind. 66, 163 N. E. 483; *Vincennes v. Vincennes Traction Co.*, 187 Ind. 498, 120 N. E. 27; *Public Service Commission v. Indianapolis*, 193 Ind. 37, 137 N. E. 705, P. U. R. 1923D, 415; *Denny v. Brady*, 201 Ind. 59, 163 N. E. 489, P. U. R. 1929A, 625. The cases cited in the foregoing paragraphs relate to the regulation of rates to be charged by privately owned public utilities. The same reasons exist for regulation of the rates of municipally owned utilities, and the power to regulate them is likewise in the state. *Springfield Gas & E. Co. v. Springfield*, 292 Ill. 236, 126 N. E. 739, 18 A. L. R. 929; *Kennebunk, K. & Wells Water Dist. v. Wells*, 128 Maine 256, 147 Atl. 188, P. U. R. 1930A, 173. * * * We conclude that the Spencer-Shively Act creating the public service commission expressly applies to municipally owned utilities, and that such commission has authority thereunder to fix the rates to be charged the public by the city of Logansport for electric current."

Although a contract fixing rates for public utility service is binding on the parties to it until the corporation commission, acting under proper statutory authority, fixes a different rate, then the rate fixed by the commission applies to all consumers and continues to prevail over the old contract rate although an appeal may be taken from the action of the commission. This principle is established and discussed as follows in the case of *American Indian Oil & Gas Co. v. Geo. F. Collins & Co. (Okla.)*, 9 Pac. (2d) 438: "Such a contract is binding upon the parties thereto only until such time as either of them invokes the jurisdiction of the corporation commission to fix a rate. * * * The contract in question was binding on the parties thereto and their assigns as to the rate to be charged and paid for gas only so long as they elected to abide thereby and no rate had been fixed by the corporation commission, and when the plaintiff elected to withdraw therefrom and asked the corporation commission to fix a rate to be charged, the contract ceased to be effective as to the rate to be charged. The plaintiff applied to the corporation commission to fix a rate, and on June 20, 1924, a rate was fixed by the corporation commission which was to become effective on July 1, 1924. The contract price for gas was paid up to the date of the issuance of that order. The plaintiff was not satisfied with the rate so fixed and, on its application, the federal court made an order fixing a different rate to become effective on August 1, 1924, upon the approval of a proper bond. * * * The authority of the corporation commission to fix rates is not dependent upon

whether or not a consumer has competitors or whether or not a consumer is the only consumer of gas in large quantities. The rate fixed by the corporation commission applies to all consumers. * * * The trial court held that the rates authorized by the corporation commission were inoperative for the reason that an appeal was taken therefrom to the Supreme Court and that the corporation commission thereby lost its jurisdiction. We do not think so."

Under the law of the survival of the fittest, competition in rates as well as for service is permitted; and while the situation of finding two or more public utilities serving a field sufficient to sustain only one is deplorable and should not have been permitted, where the state has failed to exclude unnecessary service and has established competitive conditions, the law of competition prevails and ordinarily the fight is to the finish, and the fittest survives. This necessarily results in an economic waste and loss of investment by the losing company, impairment of service, and ultimately a higher rate for the service than would have been necessary. This principle and the situation created by such competitive conditions is discussed and decided as follows in the case of *Great Northern Utilities Co. v. Public Service Commission*, 52 Fed. (2d) 802, P. U. R. 1931E, 1, 353, where the court spoke as follows: "It appears that the commission's order was followed by proceedings in the local courts which resulted in determination that the commission was vested with power to fix minimum rates, and therein was no infringement of the guaranties of either the state constitution or the Fourteenth Amendment. See *Great Northern Utilities Co. v. Public Service Commission*, 88 Mont. 180, 293 Pac. 294, P. U. R. 1930E, 134. * * * And that principle, not infringed by minimum rates fixed by the United States, equally is not by the like fixed by the states. It has been so decided wherever the issue was involved. See *Great Northern Utilities Co. v. Public Service Commission*, 88 Mont. 180, 293 Pac. 294, P. U. R. 1930E, 134 and *Egyptian Transportation System v. Louisville & N. R. Co.*, 321 Ill. 580, 152 N. E. 510, P. U. R. 1926E, 275. * * * But when the field is limited, as reasonable rates will afford fair returns to but one, and two seek to occupy it, the law of self-preservation and survival of the fittest invokes the right of competition to the last extremity; and any minimum rate and order which would prevent the struggle and condemn the rivals to the ordeal of slow starvation, is unreasonable and void. In such circumstances the state must prevent competition for patronage and not merely competition in rates.

When the state launches two upon the sea of competition and the plank of patronage will support but one, it can not in reason deny them the right of necessity to fight to a finish for financial life, even as may two castaways at sea battle to the death for the spar which will support but one, without any wrong to the survivor attaching. The remedy is in the state's hands, by restricting as many states do, the number of utilities to the need of the field. * * * That in circumstances here the minimum rate benefits nothing is so clear, that nothing contrary has been suggested or can be conceived. And this statute like all since the classic which imposed death on any who shed blood in the streets of Verona, is presumed to intend exception to avoid absurd and unjust consequences. The statute valid but not the order, plaintiff is entitled to injunction in respect to the latter only."

A federal court in a later case furnishes a further illustration of the undesirability of useless competition for service in a field which could only support one company at a fair rate. However, the competitive condition was established by proper legal authority and again the law of the survival of the fittest must prevail with the inevitable loss to all parties in the competitive fight, resulting finally in the fact that "to the victor belong the spoils." Where a municipal corporation has established its own public utility plant and is serving in competition for service with a privately-owned plant, competition in rates as well as in service must prevail, and the municipality has not the power to require its competitor to serve at the same rate as that it has fixed, even though in launching its project its intention was to charge a lower rate than the other company. The situation furnishes a practical illustration of the utter futility of attempting to handle such a situation by the law of competition, and a convincing argument against the propriety of the state or the municipality, permitting the creation of such a competitive condition. The situation and the legal principles governing this condition are fully discussed and decided as follows in the case of *Texas Electric Service Co. v. Seymour, Texas*, 54 Fed. (2d) 97, P. U. R. 1932A, 442: "It is contended that the increase demanded by the ordinance would result in a further loss of business to the complainant; that, if the complainant's rates are the same as the municipal rates, complainant will lose many of its customers. The testimony indicates that a number of those who are at present patrons of it would cease to be such if and when the rates of the two plants are made equal. The fixing of a minimum rate would, about certainly, result in such equality. Of the seventy ques-

tioned directly about this matter, approximately twenty-one say definitely that they would go over to the municipal plant if the rates were the same. * * * But we do not need any authority to support us in the conviction that one charged with the duty of making a rate must recognize the sacredness of the trust to deal fairly with the utility, so that it shall be able to exist and at the same moment scrutinize carefully the rights and needs of the people who are the customers of the utility. Whether we view the office as judicial or legislative, the holder should be above any consideration other than the solemnity of acting with exact justice. Those who composed the Seymour city council were unquestionably men of integrity, but they were men. They were of the opinion that competition was necessary. In the securing of such competition they were somewhat careless as to what should result to the utility that was already functioning. Their sole thought seemed to be for the success of the new plant. That its success might interfere seriously with the earnings of the private plant was inconsequential, provided such interference resulted in added revenue and customers for the new concern. Monopoly and competition are words that may not be used loosely when vested property rights are concerned. Monopoly is not favored by the law, nor is competition welcomed if it is to be purchased by strangling that which is already living. Ordinarily an increase of price means an increase of revenue, and an increase of revenue decreases the possibility of confiscation; but, if two poorly paid and inadequately supported public utilities are functioning side by side, the one being a so-called municipal plant and the other being a privately owned institution, and if the testimony of the actual consumers shows that some of them, at least, are customers of the private institution because its rates are lower, and that they would cease to be such customers if its rates were made equal to the municipal plant, then and in that event if such equal rates are insufficient to pay an appropriate revenue, upon the property used and useful in the private plant, there is no escape from the conclusion that the fixing of such higher minimum rate would be, within the terms of the law, confiscatory. It is immaterial that the change from the one to the other would be affected by the local sentiment, or by a patriotic feeling, or by any other consideration, that might be termed political or social. The fact with which the court is concerned is, would the change be made? If the customers would change, and thereby deplete the revenues, the showing is sufficient. This has been pointed out in a number of cases, not the least remarkable

of which is *Great Northern Utilities Company v. Public Service Commission et al.* (D. C.), 52 Fed. (2d) 802. * * * Bearing in mind the fact that regulation means to foster, protect, and control the commerce, with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety, and also bearing in mind that a public utility must not be permitted to drive out its competitors by the establishment of cut throat rates, we find that all of the guideposts may be observed by also keeping in mind that a utility is entitled to a fair return upon a fair value of its property. The city began its campaign in the present case by promising to the people a lower rate than was then being charged by the serving company. When the new plant was established, that rate was put into effect. At once the established company lost approximately half of its customers, and it thereupon lowered its rate beneath that charged by the other concern; and then followed the effort of the city council, through the ordinance complained of, to require the complainant to increase its rate to that charged by the city plant. So we find that each side has engaged in what may be termed active competition. Neither may be said to have exceeded its lawful rights. It seems that the equities are with the complainant, and that the defendant should be enjoined from putting into effect the ordinance complained of, or of visiting any of the criminal penalties of such ordinance upon the complainant."

That the interstate commerce commission may regulate fares of interurban electric railroads for interstate service and prevent discrimination in the charges for this service is established in the case of *United States v. Hubbard, Ohio*, 266 U. S. 474, 69 L. ed. 389, 45 Sup. Ct. 160, as follows: "They present on substantially similar facts the question whether interurban electric railroads engaged in interstate commerce are subject generally to regulation by the interstate commerce commission. * * * The carriers operate lines within and between Ohio municipalities, and also between these and a city in an adjoining state. The orders require the carriers to raise intrastate interurban passenger fares, which, as the commission found, subject interstate commerce to unjust discrimination. Fares within the Ohio municipalities are not affected. * * * We have no occasion to inquire into the correctness of the latter ruling, as we are of the opinion that the commission's jurisdiction to prevent unjust discrimination by interurban electric railroads against interstate commerce is not so limited. * * * As the act made no distinc-

tion between railroads operated by steam and those operated by electricity, the commission made none. These provisions indicate that congress did not intend to deny to the commission the power to regulate interurban railways in other respects."

When a franchise rate has been set aside or changed by the state under proper statutory authority, the franchise contract between the public utility and the municipality is set aside, at least so far as rates are concerned, and the new rate fixed by the state is subject to further change from time to time, and does not constitute a franchise contract with constitutional protection against change as to rates. Where there is a continuing right to regulate rates, the question of their reasonableness is always subject to investigation and change by the proper constituted authorities. This principle, construing the law of the state of Washington, is established in a number of leading cases by the Supreme Court in *Denney v. Home Tel. & T. Co.*, 276 U. S. 97, 72 L. ed. 483, 48 Sup. Ct. 223, where the court expressed the rule as follows: "The cases are here by direct appeal. The valuations approved by the court are not questioned; nor is it now claimed that the rates prescribed by the departmental order would yield adequate returns. But it is said that these rates must be regarded as contractual franchise rates and therefore they can not be confiscatory in a constitutional sense. Appellants maintain that under the statutes of Washington when the department terminates a franchise rate and prescribes another the result is 'simply to terminate one rate and substitute therefor a new rate, and that, after such substitution has been made, there still continues a franchise contract between the company and the city, which can not be again changed except by the discretion of the department, and that the refusal of the department to exercise that discretion raises no question of confiscation.' Here, it is asserted, the department merely refused to change existing approved rates which were higher than the maximum originally specified in the granted franchises. The powers and duties of the department of public works and the effect of its orders must be ascertained upon a consideration of the local constitution and statutes, and the construction placed upon them by the state courts. *Georgia R. & Power Co. v. Decatur*, 262 U. S. 432, 437, 67 L. ed. 1065, 1073, 43 Sup. Ct. 613; *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539, 65 L. ed. 764, 41 Sup. Ct. 400. The Public Service Law authorizes investigation of existing rates and expressly directs that whenever after a hearing they are found to be unjust or insufficient to yield reasonable compensation the

department shall determine what will be just and reasonable ones thereafter to be observed and fix the same by order. The order of March 31, 1923, in effect declared the rates then being observed just and sufficient to yield reasonable compensation. It expressly commanded their future observance and was sufficient to terminate the provisions of the franchises as to maximum rates, within the purview of section 55 [Rem. Comp. Stat. 1922, § 10, 391] supra. The department made its investigation and order without regard to the franchise rates and treated the questions presented as unaffected thereby. It exercised the power and duty to fix reasonable and compensatory rates irrespective of any previous municipal action. We must treat the result as a bona fide effort to comply with the local statute. There is no adequate basis for the claim upon which appellants rely."

CHAPTER 22

RATES MUST BE REASONABLE

Section	Section
545. Reasonable rates the ultimate object.	554. Limitation of reasonableness.
546. Fixing rates legislative and administrative.	555. Question of reasonableness raised by either party.
547. Rates should vary with changed conditions.	556. Discretion of parties fixing rates respected unless abused.
548. Reasonableness of rates a judicial question.	557. Municipal public utility fixing rates must be reasonable.
549. No return on investment guaranteed.	558. Cost of service includes measuring it for customer.
550. Value of service a test of reasonableness.	559. Reasonable value of service determines rates.
551. Rates for future fixed by contract or legislature, not by courts.	560. Risk of investment assumed by owner.
552. Rates presumed reasonable.	561. New inventions and improved processes.
553. Reasonableness of rates question of fact—Presumption.	562. Consolidation and elimination of competition.

§ 545. Reasonable rates the ultimate object.¹—The rates which municipal public utilities receive for their service must be reasonable, whether fixed by the state itself or by some agency duly authorized by the state such as municipalities or public utilities commissions, or where the rates have not been fixed by either of these authorities the municipal public utility has fixed the rate itself. The fixing of the proper rate and securing adequate service constitutes at once the crux and the conclusion of this whole matter concerning municipal public utilities and their service. The rate is the most fundamental question of the entire subject because it controls the means by which the municipal public utility is established and maintained, and naturally and necessarily, where the means are inadequate or insufficient, the service is impaired or destroyed.

On the other hand, where the rate received by the municipal public utility for its service is exorbitant and in excess of its value, the customer receiving the service is imposed upon by be-

¹ This section (§ 439 of 2d edition) quoted in *Harber v. Phoenix* (Ariz.), P. U. R. 1918D, 352.

ing forced to pay in excess of the value he receives. The control of these opposing forces and conflicting interests and the right to fix the rates in such cases, as has been seen, are in the state, and are now generally subject to the control of its public utilities commission.

§ 546. **Fixing rates legislative and administrative.**—The fixing of such rates by the state or its duly authorized agency, the municipality or the commission, is a legislative or administrative matter and not a judicial one; and the proper determination of it by the authorities necessarily requires the exercise of their best judgment and ripest experience. As this matter determines the means and directly affects the motive for furnishing such service, it is the point of greatest contest and the occasion for most of the controversies in the matter of the regulation and control of municipal public utilities. It demands the most impartial judgment and the fullest possible knowledge of all the facts.

The court will not substitute its judgment for that of the public service commission whose findings will be presumed to be reasonable, if supported by sufficient evidence, which as a rule the court will not review, for as the court said in the case of *Harrisville v. Public Service Comm.*, 103 W. Va. 526, 138 S. E. 99, P. U. R. 1927E, 11: "We can not substitute our judgment for the judgment of the commission, on the weight of evidence. Its findings are presumed to be reasonable, lawful, and correct, and will not be set aside by this court if based upon substantial evidence. 'Findings of fact by the public service commission, based upon evidence to support them, generally will not be reviewed by this court.' * * * Nor will such findings be disturbed on appeal unless the commission has acted so arbitrarily and unjustly as to fix rates contrary to the evidence, or without evidence to support them. * * * The value of evidence in rate proceedings varies, and the weight to be given to it is peculiarly for the body experienced in rates, and familiar with the intricacies of rate making."

While the courts will not interfere with the rates fixed by the public utilities commission which are not confiscatory, they will inquire into the sufficiency of the facts upon which the finding is based, and where these are not sufficient or fully set out, the court may enjoin the enforcement of the proposed rate or permit it to go into effect and require a bond from the public utility, conditioned on the repayment of any excess in such rates. This principle is clearly established in the case of *Ohio Bell Tel. Co. v.*

Public Utilities Comm. of Ohio, 3 Fed. (2d) 701, where the court expressed the rule as follows: "The duty with reference to such matters rests upon the utilities commission, and we are averse to entering upon its domain. When the valuation and rates have been determined, the courts may say whether they are confiscatory or not, and, if they are to be corrected, it is for the commission to make the correction. Whether the rate fixed by the utilities commission is or is not confiscatory depends wholly upon the true valuation of plaintiff's property used and useful in the public service. The question can not be determined by this court with any substantial degree of certainty upon affidavits merely, and especially so in this case, where there is such a wide difference in the values fixed by the experts whose affidavits have been filed. * * * We are therefore constrained to grant a temporary injunction against the enforcement of the order of September 7, 1923, prescribing the rates to be charged by plaintiff for telephone service rendered by it, and any attempt to enforce any penalties against plaintiff, its officers, agents, and employees for their past and future non-performance of any of the terms and provisions of such order relating to rates and the completion of unification within six weeks from the date of its making. We assume that the prolonged hearing which has been in progress before the utilities commission will be concluded at a reasonably early date. The \$25,000 bond exacted of plaintiff when the restraining order issued, to protect the defendants against costs and damages, if any, wrongfully suffered by them in consequence of this suit, and to insure repayment to telephone subscribers of the sums, if any, collected of them in excess of what may ultimately be found to be the amounts properly chargeable against them for services rendered by plaintiff, will be continued in force, with the right on the part of the defendants to move for an increase thereof, if the amount of the present bond shall be found to be insufficient."

Until the public service commission has concluded its inquiry and made its finding of facts and fixed a rate, the court will not assume in advance that the rate which the commission may fix will be confiscatory, for this would require the court to presume that the action of the commission would be unfair when taken. This principle is clearly enunciated as follows in the case of *New York Tel. Co. v. Prendergast*, 11 Fed. (2d) 162, P. U. R. 1926C, 696, where the court said: "Rate-making power is a legislative and not a judicial power. It is the duty of the public service commission, acting as the duly authorized agent of the legisla-

ture of the state of New York, to fix the rates of a public service corporation. It is about to exercise the powers with which it has been invested by legislative action, and just prior to its action this court is asked to enjoin the enforcement of certain rate-making orders of the commission which became effective on March 1, 1923. In other words we are asked to say that the rates which became effective March 1, 1923, are void, on the ground that they are confiscatory, and to say it at a time when the public service commission, which has been conducting an inquiry into the whole matter, is on the point of announcing its conclusion and fixing new rates. The concern of the courts in such cases is simply to prevent confiscation and the taking of private property for public use without just compensation. * * * It does not seem practicable at this time, and until the special master, heretofore appointed, has made his report, to undertake another and independent investigation, or even to enlarge the scope of the inquiry which he is now conducting under the prior order of the court. And for the court to undertake to dispose of the question presented upon the unsatisfactory evidence of the ex parte affidavits made by witnesses who have not been subjected to cross-examination seems to us at this time particularly ill-advised. We can not in advance assume that the public service commission, which has had this subject under investigation for months, and is about to fix anew the rates to be charged, will establish confiscatory rates. To make any such assumption, in advance of its action about to be taken, would be to reflect upon that body in an unwarranted manner. For this court to act at this particular time would indicate that in our opinion the plaintiff is about to receive unfair treatment at the hands of the public service commission."

Where, however, the rate, although fixed by statute, is plainly confiscatory, the court will not hesitate to set it aside as unreasonable, for as the court said in the case of *Brooklyn Union Gas Co. v. Prendergast*, 7 Fed. (2d) 628, P. U. R. 1926A, 412: "Resolving all doubts against the plaintiff, I am convinced that property of the plaintiff will be confiscated by operation of the statute in question. Indeed, it is doubtful whether in any view of the situation the yield would be sufficient to meet the recurring payments of interest upon outstanding bonds. * * * Running all through the case, there seems to be the doctrine that no hard and fast rule exists by which going-concern value is to be calculated. There is, however, a definite recognition of the difference in value between a concern without consumers and a con-

cern that is prosperous with its consumers. * * * I have, however, chosen to eliminate any allowance for going-concern value in ascertaining reproduction cost or in adopting a rate base. All doubt is thereby resolved against the plaintiff, and the statute has still been shown clearly confiscatory. * * * Reluctant as any court should be to declare a statute of this character confiscatory until it has been demonstrated so to be during a test period, I am of the opinion that plaintiff in the action at bar has brought itself within the exception to the general rule which is laid down in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, *supra*."

This same court in a later decision construing this statute as amended in 1923 to be confiscatory in the rate fixed by it as to gas companies, furnished an extended discussion of the reasons for the decision, which are convincing, as they appear in the case of *Brooklyn Borough Gas Co. v. Prendergast*, 16 Fed. (2d) 615, P. U. R. 1927A, 200, where the court quoted from the findings of the special master as follows: "Having found from all the evidence that the statute is confiscatory, it is unnecessary to consider whether it is also discriminatory. As I have pointed out, the regulation of rates is within the exercise of its police power. * * * It has been held that the statute has but a single purpose, and that the rate and standard specified therein are inseparable. See cases *infra*. I see no ground, therefore, for holding that a resort to the public service commission to alter the standard fixed by the statute is a condition precedent to the maintenance of an action challenging the constitutionality of the statute of 1923. * * * His endeavor was to get at a basis for rate making by seeking a fair reproduction value based on a period of five years, and thus to avoid what he regarded as an 'abnormal' reproduction cost. * * * It is to be noted that the commission, less than a year prior to the enactment of the one dollar statute here under attack, fixed a one dollar and thirty cent rate for this company, to continue in effect for at least a year. It is not contended by either of the defendants that that rate was an unfair or an unjust one. After Judge Hughes' report, the plaintiff applied to the public service commission to fix a rate, which it did, at one dollar and forty cents per thousand cubic feet, on and after August 1, 1920. * * * The plaintiff urges that it is entitled to earn a ten per cent return upon the present value of its property; defendants contend that a six per cent return is sufficient. * * * The civic, social,

and economic benefits of the making of extensions into the developing sections of the borough of Brooklyn, and of the furnishing of adequate and efficient service, are obvious. To discharge these duties, the plaintiff must be able to attract capital upon a basis that will assure to the investors a just reward for the use of their capital. * * * The great weight of authority in this and in the southern district favors an eight per cent return. * * * And that rate is, I feel, controlling upon this court in this case. * * * 'It is the property, and not the original cost, which the owner may not be deprived of without due process.' In the present case, there is no issue as to the amount or extent of the plaintiff's property. The inventories are unchallenged. The plaintiff presented full and detailed proof as to the cost of reproduction of its property. The defendants offered no testimony as to the value of plaintiff's property, other than the estimates of Mr. Merrifield as to the value of the mains, and of Mr. Little as to the value of mains, services, and meters, all of which estimates were based upon an assumed reproduction of plaintiff's property. Plaintiff's witnesses as to value were subjected to lengthy and rigid cross-examination. The cases are practically unanimous that each case must be determined upon the facts peculiar to it. * * * The original cost of all the plaintiff's property has not been proved in this action. * * * It is elemental industrial economics that the cost of land, material, and labor does not represent the full amount that it is necessary to use in production or construction. That overheads are necessary, unavoidable, and must be allowed in this type of cases is recognized. * * * Of the necessity of adequate working capital in the management of any enterprise there can be no argument. It is the daily life blood stream of the business; it keeps the pay of those laboring for the company and the bills of its creditors and supply houses paid promptly. Not only must a mobile capital fund for those purposes be there, but it must be present from day to day in amounts adequate for the reasonable needs of the company. The adequate amount necessary even defendants' witness Mr. Little concedes is largely a matter of management. * * * Manifestly, the value of plaintiff's property is not to be confined to its physical property alone. It is a going business; it functions; it is not just so much idle realty, buildings, plant, apparatus, equipment, tools, and a distribution system. * * * That intangible property acquired by the 'expenditure of time, labor and money,' which puts the whole works into motion, makes it function efficiently, makes the service available and useful to the pub-

lic and a profitable enterprise to the company, is a real value, capable of measurement in rate cases, is now well recognized.

* * * Going value is not to be confused with good will. Users of the service and commodity of a utility having a monopoly in its territory are dependent upon that particular utility for that service and commodity irrespective of their good or ill will toward the utility. Nor is franchise value to be considered as a part of going value, and it had not been considered in this case. I am not unmindful that the appliance business may not be subject to regulatory control. Use of gas, however, without appliances is impossible. The development of such business is necessarily important to a gas company in its gas sales. The cost of obtaining such business is a necessary incident to the conduct of the plaintiff's business. It is a cost that has its reflection in the going value of the plaintiff.

* * * All the evidence clearly shows that the dollar rate, fixed by the statute, considered apart from the standard fixed thereby, is confiscatory. When the standard is also considered, it only adds to the margin by which the statute is confiscatory. The statute, if enforced, would leave the plaintiff no substantial return upon the value of its property. The case is so clear that no experimentation with either rate or standard was or is required to establish its unconstitutionality." On these findings the court commented as follows: "The special master appointed in this suit has reported that the New York state statute (chapter 899 of the Laws of 1923) which prohibits the plaintiff, as a public utilities corporation engaged in furnishing gas to inhabitants of the borough of Brooklyn, city of New York, from making a charge in excess of one dollar per thousand cubic feet and requiring gas furnished to have a standard of not less than 650 British thermal units, is unconstitutional as to this plaintiff because it is confiscatory. The district courts for the southern and eastern districts of New York have held the law to be unconstitutional: *New York & Richmond Gas Company v. Prendergast* (D. C.), 10 Fed. (2d) 167; *Kings County Lighting Company v. Prendergast* (D. C.), 7 Fed. (2d) 192; *Brooklyn Union Gas Company v. Prendergast* (D. C.), 7 Fed. (2d) 628; *Consolidated Gas Company v. Prendergast* (D. C.), 6 Fed. (2d) 243; *New York & Queens Gas Company v. Prendergast* (D. C.), 1 Fed. (2d) 351. This result has been affirmed by the Supreme Court of the United States in *Ottinger v. Brooklyn Union Gas Company*, 47 Sup. Ct. 199, 71 L. ed. 421; *Ottinger v. Kings County Lighting Company*, 47 Sup. Ct. 199, 71 L. ed. 421; and *Ottinger v. Consolidated Gas Com-*

pany, 47 Sup. Ct. 198, 71 L. ed. 420 (decided November 29, 1926). The valuations in the present case justify the same holding; they also allow an eight per cent return. The commission unanimously determined on May 10, 1922, that this plaintiff requires an eight per cent return to pay its bond interest, other fixed charges and dividends in order to carry on its business successfully and attract new capital. Such a rate is permissible under *McCardle v. Indianapolis Water Company*, 272 U. S. 400, 47 Sup. Ct. 144, 71 L. ed. 316, decided by the Supreme Court in November, 1926. On the argument, so far as we were able to ascertain the position of the attorney general and the commission, objection was made to the allowances for depreciation, going value, reproduction, and working capital. We have examined these various items and the method of arriving at the values as fixed by the master, and the views he expresses and the reasons advanced are satisfactory to us. We have likewise examined the exceptions filed by the plaintiff to these items of valuation for reproduction cost of tangible property, the allowance for working capital, and the going value possessed by the plaintiff in its business. We think the decision of the master as to these items is correct. He has been guided by, and followed, the rule announced in the authoritative decisions of the Supreme Court, which found utterance in its latest pronouncement (*Indianapolis Water Company case*, 272 U. S. 400, 47 Sup. Ct. 144, 71 L. ed. 316, decided November, 1926). The opinion and report of the special master deserves commendation for its careful consideration and analysis of the issues. We deem it unnecessary to add more than to say that his conclusions and reasons therefor meet with our approval."

In distinguishing between a rate that is not confiscatory under the constitution and one merely insufficient to secure efficient service for the public, the courts distinguish between such rates and recognize that the former raises a judicial question while the latter is concerned with legislative discretion. This distinction is clearly pointed out in the case of *Columbus Gas & Fuel Co. v. Columbus, Ohio*, 17 Fed. (2d) 630, P. U. R. 1927C, 639, as follows: "There is a well-marked distinction between a return nonconfiscatory in character, and one which is fair in a commercial and economical sense. A rate of return may be all sufficient in fulfilling the demands of the Fourteenth Amendment of the Constitution of the United States, and at the same time fail in amount to encourage and justify the operation of a utility business under that degree of maximum efficient service to which

the public is entitled. The former is a purely judicial question, while the latter is essentially legislative."

§ 547. **Rates should vary with changed conditions.**—As each municipal public utility system individually has conditions peculiar to itself, the determination of the proper rate for such service is necessarily confined to the facts of the particular case in question and while a number of general principles governing the matter are well established, their proper application in any particular case is modified and controlled by the particular facts of the case in question. There are so many changing circumstances currently affecting the cost of supply, the nature and extent of the service, the prospects for its being permanent or becoming more profitable by the demand increasing, while the cost is decreased by inventions and more improved methods of supply and distribution, that the matter of fixing the rates fairly is as difficult of accomplishment as it is necessary that the entire matter be placed in the hands of competent authorities with power to regulate and change with the varying conditions. The regulation of rates, being legislative and governmental in its nature and for the benefit of the consumers of the service, is necessarily continuing, for the right to modify or change the rate should always be available to the authorities in charge of the matter in the interest of the public as well as for the sake of doing justice between the parties, and this furnishes the chief occasion and the greatest opportunity for commission regulation and control.

A striking illustration of the fact that rates should vary in order to meet changed conditions and costs, occasioned by the World War, is furnished in the case of *Middlesex Water Co. v. Board of Public Utility Comrs.*, 10 Fed. (2d) 519, P. U. R. 1926C, 707, as follows: "The World War conditions radically increased the cost of labor and commodities of all sorts. Previous thereto the level of prices was practically stable. While the peak in high prices has passed, and there is reason to believe that it will not permanently return, yet the prevailing prices continue to be considerably higher than they were in 1915. * * * While these higher levels continue, they must be given effect in fixing a rate base, as it is not the past (historical), or the future (speculative), but the present, fair value that must be ascertained. * * * The rates fixed by the defendant, even if permitted to be collected in full, were estimated by it as a fair return on a valuation considerably less than \$2,500,000. With the ten per cent deducted from the rates, as ordered by the defendant, the

return on the valuation of \$2,500,000 would be less than six per cent, which, in these days of inflated prices, or, in other words, diminished purchasing power of the dollar, in our judgment, makes the rates permitted to be collected confiscatory. * * * For these reasons, we are of the opinion that the rates under consideration are confiscatory and invalid, and should be enjoined."

Where the same public utility is serving a number of municipalities with its railway system and a hearing for an injunction is pending, alleging that the statutory rate is confiscatory, and before this hearing is determined, another statutory rate is proposed, which is also alleged to be confiscatory, the court may consolidate the entire matter and dispose of it in the same hearing, as is indicated in the case of *International R. Co. v. Prendergast*, 29 Fed. (2d) 296, P. U. R. 1929B, 142, where the court said: "Both the old and the new rates are alleged to constitute a wrongful taking of plaintiff's properties in the different communities. In *St. Louis & S. F. R. Co. v. Hadley (C. C.)*, 155 Fed. 220, a somewhat similar situation arose. Plaintiff sought to restrain the enforcement of a certain freight rate in violation of constitutional rights. While the action was pending, another statute was passed by the legislature fixing passenger rates, and on application to file a supplemental bill asserting that the second statute was also confiscatory, the court ruled that both acts might properly be brought in as an issue by supplemental bill, but the court regarded it as unimportant whether the new issue was by supplemental bill or made a part of the original bill. Defendants contend that the action should not proceed under supplemental bill because it complains of a new rate, while the initial bill is under an earlier rate. But, as in both the same relief is asked, arising out of the identical legislative act in refusing the tariff filed, I can see no controlling point to this contention. The supplemental bill may be based upon different valuation and proposed rates, income, and costs of operation, but any changes of that description do not put defendants at a disadvantage, for such matters are, I think, for the most part evidentiary. That the rejection of the tariff for a straight ten-cent fare was a final determination is beyond question. * * * It was neither necessary to apply for modification of the present rate, nor was it required that plaintiff should begin suit to prevent confiscation in the state court before asking for relief in this court. * * *

As already stated, the original and supplemental bills seek to enjoin the defendant public service commission from con-

fiscating plaintiff's property in violation of its constitutional rights, and allege that the commission interferes and estops plaintiff from collecting a straight ten-cent fare in the city of Buffalo, and charging the rates specified in the rejected tariff. The various municipalities, therefore, adverse to the plaintiff, are proper parties to the determination of the questions involved. The tariff schedule asks for increased rates throughout the system, and, since the tracks and routes pass through these localities, and certain of its property is contained therein, they obviously are interested in the outcome of the litigation. The public service commission, which returned the tariffs, and which, as alleged in the original and supplemental bills, has not placed a value on plaintiff's system or properties in the various localities, is the sole necessary party in so far at least as Buffalo, North Tonawanda, Lockport, and Lancaster are concerned. Their interest in the pending litigation of the municipalities, though admittedly important, constitutes them all proper parties because of their right to oppose, not only the theory of the bill or proportionate rates, but also the claimed confiscation in localities by the rates now in force."

Where a through fare with transfer privileges has been fixed by the state, which is clearly confiscatory, the public utility may resort to the federal court for an injunction against the enforcement of such a rate which the court will grant under these conditions. This principle is established and fully discussed in the case of *Banton v. Belt Line R. Corp.*, 268 U. S. 413, 69 L. ed. 1020, 45 Sup. Ct. 534, P. U. R. 1926A, 317, as follows: "This suit was commenced December 16, 1920, by appellee, to enjoin the enforcement of an order of the New York public service commission, first district (succeeded by the transit commission), made October 29, 1912. The order established joint routes on street railways in New York city, and prescribed five cents as the maximum joint fare. * * * But on June 18, the commission suspended this tariff, and so compelled appellee to continue to comply with the order of October 29, 1912. * * * There has been no determination of the matter by the commission, and so the order fixing joint fares at seven cents never took effect. Neither the original application nor the petition for rehearing relieved appellee of the burden of compliance with the order of October 29, 1912. No application to the commission for relief was required by the state law. None was necessary as a condition precedent to the suit. See *Prendergast v. New York Telephone Co.*, 262 U. S. 43, 67 L. ed. 853, 43 Sup. Ct. 466. * * * On the point

under consideration, it must be assumed that the joint fare of five cents was confiscatory, as alleged. The continued enforcement of that rate would operate to take appellee's property without just compensation, and to compel it to suffer daily confiscation. Notwithstanding the matter was pending on rehearing, the appellee had the right to sue in the federal court to enjoin the enforcement of the rate. It was not bound to await final action by the commission, and, if the rate was in fact confiscatory, to serve in the meantime without just compensation. * * * If the rates enjoined are confiscatory, appellee is entitled to relief, notwithstanding its obedience to the order in respect of other lines and fares. It was not bound to attack the prescribed rates as to all the routes. It is not suggested that the commission is without power to prescribe equal and nonconfiscatory rates. The effect of the injunction on the business of the Third Avenue Company and its competitors is not involved in this suit; nor are they complaining. * * * The commission had power to establish through rates and fix joint fares. The law required street railroad corporations to comply with every order made by the commission, and prescribed penalties to enforce such orders. See subdivision 3, section 49, section 56, Public Service Commission Law, *supra*. The Central Park, North & East River Railroad Company, appellee's predecessor, accepted the order, and put in effect the prescribed joint fare of five cents. There is no suggestion that it was not bound to do so, or that the order was not then valid and binding on the company. A rate that is just and reasonable when prescribed subsequently may become too low, unreasonable, and confiscatory. * * * That company [Central Park N. & E. River R. Co.] did not agree to serve for the prescribed joint fare of five cents, and was not bound to do so if the rate was found to be, or if thereafter it should become, confiscatory. It did not surrender the protection of the Fourteenth Amendment. * * * There is nothing in appellee's certificate of incorporation or the laws under which it was organized that imposes upon it any obligation to continue to serve for a portion of the joint fare of five cents. The commission's order constitutes no part of the charter of appellee; and we find no agreement by appellee, expressed or implied, to comply with the order. * * * The commission, under the guise of regulation, may not compel the use and operation of the company's property for public convenience without just compensation. The evidence sustains the finding of the master and the district court that the joint fare of five cents is confiscatory. * * * There

are involved only the rates applicable to a part of the company's business. * * * The state is without power to require the traffic covered by the fare enjoined to be carried at a loss, or without substantial compensation over its proper cost. And such cost includes not only the expenditures, if any, incurred exclusively for that traffic, but also a just proportion of the expenses incurred for all traffic of which that in question forms a part. The cost of doing such business is not, and properly can not be, limited to the amount by which total operating expenses would be diminished by the elimination of, or increased by adding, the transfer passengers in question. It would be arbitrary and unjust to charge to that class of business only the amount by which the operating expenses were, or would be, increased by adding that to the other traffic carried. Outlays are none the less attributable to transfer passengers because also applicable to other traffic. Operating expenses which are incurred on account of all passengers carried, and which are not capable of direct allocation to any class, should be attributed to the transfer passengers in question in like proportion as such expenses are fairly chargeable to other passengers receiving like service. While the carrier has no constitutional right to the same rate or percentage of return on all its business, the state may not select any class of traffic for arbitrary control and regulation. Broad as is its power to regulate, the state does not enjoy the freedom of an owner. Appellee's property is held in private ownership; and, subject to reasonable regulation in the public interest, the management and right to control the business policy of the company belong to its owners. * * * It is well known, and the court will take judicial notice of the fact, that the purchasing power of money has been much less since 1917 than it was in 1912, when the order was made; and that the cost of labor, materials, and supplies necessary for the proper operation and maintenance of street railways has greatly increased. * * * The mere fact that a rate is nonconfiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable and not excessive or extortionate. * * * These figures show that the operating expenses and taxes, both before and after the injunction, substantially exceeded two cents, the amount received by appellee per transfer passenger. Exclusive of any allowance for a depreciation reserve or for interest, the average cost per passenger has been from about twenty-four

per cent to about fifty-one per cent in excess of two cents; and, if interest on the debt at five per cent be included, it appears that the excess has been from about fifty per cent to one hundred and five per cent. And the record shows that for some time prior to the injunction, the total revenue from all sources, including revenue for transportation, advertising, rentals, and interest on deposits, was less than a sum sufficient to cover operating expenses, taxes, and interest on the debt, and also shows that both before and after the injunction such total revenue was not sufficient to yield a reasonable return on the value of the property, after paying operating expenses and taxes. The master found that a resumption of the transfer traffic enjoined would result in an increase of revenue of \$46,326.72 per year and of operating expenses of \$105,900 per year. These findings were not confirmed. The district court found that the revenue would be increased by about \$42,000 per year, and operating expenses about \$46,000 per year. The evidence undoubtedly justifies the conclusion that a resumption of such transfer business would require additional operating expenses in an amount in excess of the resulting increase of revenue, and that appellee's fair share of the joint rate would be substantially less than the operating expenses and taxes justly chargeable to that business. It follows that the rate is confiscatory. We need not determine the value of the property attributable to the traffic in question, or what would constitute a reasonable rate of return."

§ 548. Reasonableness of rates a judicial question.—Although the fixing of rates is a legislative and governmental matter over which the state has complete control, it has no power to fix rates that are unreasonable or to regulate them arbitrarily. The determination that any particular rate, whether fixed by the authority of the state or by the municipal public utility itself, is fair and reasonable is a judicial question over which the courts have complete control. And while the schedule of rates fixed by the state or an agency to whom this power has been delegated is presumed to be fair and reasonable so that the burden of proving that it is arbitrary and unreasonable is on the municipal public utility making the claim, the state has not the power under the guise of regulation to destroy or confiscate the property of the corporation providing the service; and where the rate fixed has the effect of depriving the company of the right to realize a reasonable return on its investment, the courts will not hesitate to set aside such a schedule of rates as unreasonable

and, in effect, a taking of the right to the use of its property as well as of the property itself without due process of law.

The term "regulation" implies a fair investigation and a full consideration of all the facts affecting the matter upon which such a rate of return should be allowed as will permit of the continued existence of the municipal public utility and the furnishing of adequate service as well as a reasonable return on the necessary investment. The court, however, is restricted to the question of determining whether any particular rate already fixed is reasonable or otherwise and can not itself fix such rate because this power inheres entirely in the legislative department of the state.

On a proposed material reduction in the rates for gas service in Florida, where the season is short and the yearly income uncertain because the business of a few months determines the annual income, the court may enjoin the new rate proposed and require the public utility to furnish bond, conditioned on refunding the amount of the proposed decrease in case this rate is finally determined to be the reasonable one, for as the court said in the case of *Florida Public Utilities Co. v. West Palm Beach, Florida*, 36 Fed. (2d) 318, P. U. R. 1930C, 292: "It is no doubt true that a company manufacturing artificial gas is required to have an excess of generating capacity to take care of the peak load, and in fixing the fair value of the property jointly used the fact that for approximately seven months of the year very little gas is consumed at Palm Beach should be taken into consideration. However, it may well be that the distributing system in West Palm Beach exceeds in value the generating plant and the peak load might be taken care of by adequate storage capacity at very much less cost than by a generating plant sufficient to produce enough gas daily to take care of the demand. * * * The bill, with exhibits and supporting affidavits, shows a *prima facie* case entitling appellant to relief. It is plain that if appellant is forced to reduce its rates approximately twenty per cent, with the number of customers it has, and the small average of the monthly bills, it will suffer irreparable injury if eventually the reduction should prove to be unwarranted. On the other hand, the customers and the defendants may be amply protected by a bond. In *Ohio Oil Co. v. Conway*, 279 U. S. 813, 49 Sup. Ct. 256, 73 L. ed. 972, the Supreme Court restated the rule as follows: 'Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain

and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.' The judgment appealed from is reversed, with instructions to grant a preliminary injunction; appellant to give bond in such reasonable amount as shall be fixed by the district court. The terms and conditions of said bond to be prescribed, and the surety to be approved, by the district court."

After the public utility has exhausted its remedy before the state commission, it may resort to the federal court on the question of the rate being confiscatory in violation of the federal Constitution, especially where there is a diversity of citizenship; and the federal court is not bound by a provision of the state statute forbidding a stay of proceedings until the final decree is rendered, which in itself furnishes a further reason for resorting to the federal court for relief, as is indicated in the case of *Pacific Tel. & T. Co. v. Kuykendall*, 265 U. S. 196, 68 L. ed. 975, 44 Sup. Ct. 553, where the court expressed the rule as follows: "Instead of applying to the superior court of the state, therefore, application was made by the bill herein to the federal district court within the thirty days to restrain the order of the department as violative of the Fourteenth Amendment. * * * It is apparent from these provisions that after the commission finally denied the increase of rates applied for, the company had exhausted its administrative remedy to avoid the alleged confiscatory rates under which it was compelled to render the service. It had, therefore, no recourse but to a court. Both by reason of diverse citizenship and because of the federal constitutional question, the federal court of equity was available to it. The state statute forbidding a stay of proceedings until a final judicial decree was rendered, of course, could not prevent a federal court of equity from affording such temporary relief by injunction as the principles of equity procedure required. The conditions set out in the bill, therefore, seem to have made a case ripe for federal relief. * * * It is clear that the function of the courts in fixing the valuation of the property of the public utility is not confined to a judicial review of the work of the commission. The courts are made part of the valuation tribunal, pass on the weight of the evidence, and can set aside a valuation and make a new one. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. 445. * * * A litigant

whose constitutional rights are being invaded, and to whom a statute denies a supersedeas in the state tribunals, may properly base his application for equitable relief on the effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state constitution. * * * We think, therefore, that the district court erred in denying a temporary injunction under section 266, on the ground that the bill was premature."

Where the service is intrastate, the court will sustain the order of the public service commission, regulating the service and fixing the rate, although the gas supplied is mixed with that being transported in interstate commerce over which, of course, the commission has no control. On the theory that sufficient gas was being transferred in intrastate commerce to supply the needs of the service regulated by the commission, the court sustained its right to regulate this part of the service in the case of *Peoples Natural Gas Co. v. Public Service Comm.*, 270 U. S. 550, 70 L. ed. 726, 46 Sup. Ct. 371, P. U. R. 1926D, 187, where the court said: "At the state boundary that gas passes through a registering meter and that point is treated as the place of delivery to the Peoples Company; but the transportation is not interrupted there. The gas from the company's wells in Pennsylvania is fed into the moving stream at different points after it crosses the state boundary. The movement of the stream towards the points of destination is accelerated by means of pumps in Pennsylvania—one near the state line and one remote from it. The Peoples Company sells directly to consumers at the several places of consumption, other than Johnstown, and there it sells to an independent company, having a local franchise and distributing plant, which sells to consumers. For upwards of ten years the gas sold to that company was supplied under a contract, but when the order in question was made the Peoples Company had exercised a reserved privilege of terminating the contract; and the commission in making the order proceeded on the theory that the Peoples Company is a public service corporation and may be required, irrespective of the terms of the contract, to continue supplying gas to the local company and thus to continue its indirect service to Johnstown consumers. The order does not fix the rate for this service, but contemplates that it shall be fixed primarily by a schedule to be filed by the Peoples Company and shall be subject to supervision by the commission as respects its reasonableness. * * * As respects the West Virginia gas we are of opinion, in view of its continuous transportation

from the places of production in one state to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business. * * * As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So, for all practical purposes the two are separable, and neither affects the character of the business as to the other. * * * The Supreme Court of the state has found that more than enough Pennsylvania gas goes into the mixture to meet the requirements of the order, and on this basis has construed the order as leaving the company free to deal in usual course with so much of the mixture as represents the gas from West Virginia. We think the finding has ample support in the evidence, and we accept of course that court's construction of the order. In these circumstances the conclusion is unavoidable, we think, that the order does not interfere with or affect the interstate commerce in which the company is engaged."

Resort to the federal court for relief against confiscatory rates is permitted although the question as to the reasonableness of such rates is still pending before the state commission, where it had remained practically dormant for an unreasonable time and there was no indication of action by the commission. This principle is established and discussed as follows in the case of *Smith v. Illinois Bell Tel. Co.*, 270 U. S. 587, 70 L. ed. 747, 46 Sup. Ct. 408, P. U. R. 1926C, 754, where the court said: "This request was ignored; and the commission ever since has failed and refused to determine the issues in the cause or to determine whether the rates and charges provided in the second schedule are just and reasonable; but has continued in effect the rates and charges contained in the first schedule approved by it. These rates not only do not yield a fair return, but are insufficient to pay the operating cost of rendering telephone service to the subscribers and patrons of the exchange. Finally, it is alleged

that the company is deprived of its property without due process of law and is denied the equal protection of the law, in violation of the Fourteenth Amendment to the federal Constitution. This conclusion, which necessarily results from the facts, is not seriously challenged, but a reversal of the decree below is sought on the ground that the company, prior to filing its bill, had not exhausted its legislative remedies. * * * It thus appears that, following the decree of the state court reversing the permanent order in respect of the second schedule and directing further proceedings, the commission for a period of two years, remained practically dormant; and nothing in the circumstances suggests that it had any intention of going further with the matter. For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief."

This same court more recently affirmed the principle which permits a public utility to resort to the federal court where a question of confiscatory rates under the federal Constitution is involved, for as the court said in the case of *Railroad & Warehouse Comm. v. Duluth St. R. Co.*, 273 U. S. 625, 71 L. ed. 807, 47 Sup. Ct. 489: "If, then, the state court should affirm the rate fixed by the commission, and the matter should become *res judicata*, a resort to the federal court would be too late. But the plaintiff, if it prefers to entrust the final decision to the courts of the United States rather than to those of the state, has a right to do so. * * * Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the state court, when at least it is possible that, as we have said, it would find itself too late if it afterwards went to the district court of the United States. * * * If, apart from the supposed contract, a party would have been entitled to go to the court of the United States at the stage when the plaintiff went

there, no reasonable interpretation of the contract forbade the plaintiff to go, and there is no need to consider whether the contract could have forbidden it if it had tried."

§ 549. **No return on investment guarantied.**—No particular return, however, is guarantied to the municipal public utility on its investment which it made voluntarily and of its own accord, for it thereby necessarily assumes the risk of the investment being prudent and so a profitable and successful one. Such an undertaking has no absolute right to be assured of the security and success of its investment any more than has a private enterprise, although the utility's failure to realize a fair return on the investment would finally result in the utility's dissolution and a consequent discontinuance of the service rendered. It is a general rule that the return is limited to the necessary investment and does not cover property acquired by the company which is not reasonably necessary to the service either presently or prospectively; and mistakes in the business judgment of the management in charge of the enterprise must be met by the parties making the investment and not by the consumers of its service.

§ 550. **Value of service a test of reasonableness.**—While the interests of the owners of the property are to be considered they are not entitled to a greater return than can normally be earned under proper management. In other words as between the two parties, the public or the consumer has the right to receive the service at its fair value or for what it is worth. The customer has the right to demand that no more shall be exacted from him for such service than the reasonable value of the service, and should not be subjected to the payment of unreasonable rates in order that stockholders may earn dividends. If such a corporation can not maintain and operate its plant so as to pay satisfactory dividends on all its outstanding stock, this is a failure which the constitution does not require to be remedied by imposing unjust burdens upon the public.²

The following cases are referred to by way of illustrating the rule, and its application, that fixing rates is a legislative matter and that the determination as to whether the rates when fixed are reasonable is judicial; and also that no particular return is guarantied such a corporation on its investment but that the

² Covington & Lexington Turnpike Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198.

value of the service is a test of the rate to be charged for it, although in the last analysis rates must be reasonable.³

³ United States. Chicago &c. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. 400; Reagan v. Farmers Loan &c. Co., 154 U. S. 362, 28 L. ed. 1014, 14 Sup. Ct. 1047; San Diego Land &c. Co. v. National City, California, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804; Peoples Gas Light &c. Co. v. Chicago, Illinois, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. 520; Louisville, Kentucky v. Cumberland Tel. & T. Co., 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. 741; Wood v. Vandalia R. Co., 231 U. S. 1, 58 L. ed. 97, 34 Sup. Ct. 7; Louisville &c. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. 48; In re Engelhard & Sons Co., 231 U. S. 646, 58 L. ed. 416, 34 Sup. Ct. 258; Des Moines Gas Co. v. Des Moines, Iowa, 238 U. S. 153, 59 L. ed. 1244, 35 Sup. Ct. 811, P. U. R. 1915D, 577; Landon v. Public Utilities Comm. of Kansas, 249 U. S. 236, 63 L. ed. 577, 39 Sup. Ct. 268; Lincoln Gas &c. Co. v. Lincoln, Nebraska, 250 U. S. 256, 63 L. ed. 968, 39 Sup. Ct. 454, P. U. R. 1919E, 219, 1919F, 138; Los Angeles, California v. Los Angeles Gas &c. Corp., 251 U. S. 32, 64 L. ed. 121, 40 Sup. Ct. 76; Southern Iowa Elec. Co. v. Charleston, Iowa, 255 U. S. 539, 65 L. ed. 764, 41 Sup. Ct. 400, P. U. R. 1921D, 275; Newton v. Consolidated Gas Co., 258 U. S. 165, 66 L. ed. 538, 42 Sup. Ct. 264, P. U. R. 1922B, 752; Wichita R. & Light Co. v. Public Utilities Comm. of Kansas, 260 U. S. 48, 67 L. ed. 124, 43 Sup. Ct. 51, P. U. R. 1923B, 300; Paducah, Kentucky v. Paducah R. Co., 261 U. S. 267, 67 L. ed. 647, 43 Sup. Ct. 335, P. U. R. 1923C, 309; Arkansas Nat. Gas Co. v. Arkansas Railroad Comm., 261 U. S. 379, 67 L. ed. 705, 43 Sup. Ct. 387, P. U. R. 1923C, 714; Bluefield Water Works &c. Co. v. Public Service Comm. of West Virginia, 262 U. S. 679, 67 L. ed. 1176, 43 Sup. Ct. 675; Prendergast v. New York Tel. Co., 262 U. S. 43, 67 L. ed. 853, 43 Sup. Ct. 466, P. U. R.

1923C, 719; Georgia R. & Power Co. v. Decatur, Georgia, 262 U. S. 432, 67 L. ed. 1065, 43 Sup. Ct. 613, P. U. R. 1923E, 387; Georgia R. & Power Co. v. College Park, Georgia, 262 U. S. 441, 67 L. ed. 1074, 43 Sup. Ct. 617; Georgia R. & Power Co. v. Railroad Comm. of Georgia, 262 U. S. 625, 67 L. ed. 1144, 43 Sup. Ct. 680, P. U. R. 1923D, 1; Pacific Tel. & T. Co. v. Kuykendall, 265 U. S. 196, 68 L. ed. 975, 44 Sup. Ct. 553; Pacific Gas &c. Co. v. San Francisco, California, 265 U. S. 403, 68 L. ed. 1075, 44 Sup. Ct. 537, P. U. R. 1924D, 817; Banton v. Belt Line R. Corp., 268 U. S. 413, 69 L. ed. 1020, 45 Sup. Ct. 534, P. U. R. 1926A, 317; Peoples Nat. Gas Co. v. Public Service Comm., 270 U. S. 550, 70 L. ed. 726, 46 Sup. Ct. 371, P. U. R. 1926D, 187; Smith v. Illinois Bell Tel. Co., 270 U. S. 587, 70 L. ed. 747, 46 Sup. Ct. 408, P. U. R. 1926C, 754; Railroad & Warehouse Comm. v. Duluth St. R. Co., 273 U. S. 625, 71 L. ed. 807, 47 Sup. Ct. 489; Smith v. Illinois Bell Tel. Co., 283 U. S. 808, 75 L. ed. 99, 51 Sup. Ct. 255, P. U. R. 1931A, 1.

Federal. Capital City Gas Light Co. v. Des Moines, Iowa, 72 Fed. 829; New Memphis Gas &c. Co. v. Memphis, Tennessee, 72 Fed. 952; Spring Valley Water Works v. San Francisco, California, 124 Fed. 574; Palatka Water Works v. Palatka, Florida, 127 Fed. 161; Spring Valley Water Co. v. San Francisco, California, 165 Fed. 667; Pocatello, Idaho v. Murray, 173 Fed. 382; Spring Valley Water Works v. San Francisco, California, 192 Fed. 137; Kankakee, Illinois v. American Water Supply Co., 199 Fed. 757; Bonbright v. Geary, 210 Fed. 44; Southern Bell Tel. & T. Co. v. Birmingham, Alabama, 211 Fed. 709; Van Dyke v. Geary, 218 Fed. 111, affd. in 244 U. S. 39, 61 L. ed. 973, 37 Sup. Ct. 483; Landon v. Public Utilities Comm. of Kansas, 234 Fed. 152, P. U. R. 1917A, 120; Goldfield Consol. Water

Co. v. Public Service Comm. of Nevada, 236 Fed. 979, P. U. R. 1917A, 685; St. Joseph Gas Co. v. Barker, 243 Fed. 206, P. U. R. 1918C, 142; Kings County Lighting Co. v. Nixon, 268 Fed. 143, P. U. R. 1921A, 737, *affd.* in 258 U. S. 180, 66 L. ed. 550, 42 Sup. Ct. 268; Southwestern Tel. & T. Co. v. Houston, Texas, 268 Fed. 878, P. U. R. 1921C, 222, *affd.* in 259 U. S. 318, 66 L. ed. 961, 42 Sup. Ct. 486; New York & Queens Gas Co. v. Newton, 269 Fed. 277, P. U. R. 1921A, 530, *affd.* in 258 U. S. 178, 66 L. ed. 549, 42 Sup. Ct. 268; Landon v. Court of Industrial Relations, 269 Fed. 433, P. U. R. 1921A, 807; Winona, Minnesota v. Wisconsin-Minnesota Light & Co., 276 Fed. 996; Louisville, Kentucky v. Louisville Home Tel. Co., 279 Fed. 949; New Orleans, Louisiana v. O'Keefe, 280 Fed. 92; Southern Bell Tel. & T. Co. v. Railroad Comm. of South Carolina, 280 Fed. 901, P. U. R. 1923A, 202; Louisville, Kentucky v. Louisville R. Co., 281 Fed. 353, P. U. R. 1923E, 759; Louisiana Water Co. v. Public Service Comm. of Missouri, 294 Fed. 954, *app. dis.* 269 U. S. 597, 70 L. ed. 432, 46 Sup. Ct. 120; Joplin Gas Co. v. Public Service Comm. of Missouri, 296 Fed. 271, P. U. R. 1924D, 137; Swan v. Public Utilities Comm. of Kansas, 298 Fed. 114; Southern Bell Tel. & T. Co. v. Railroad Comm. of South Carolina, 299 Fed. 615; Reno Power, Light & Co. v. Public Service Comm. of Nevada, 300 Fed. 645; New York & Queens Gas Co. v. Prendergast, 1 Fed. (2d) 351; Brooklyn Union Gas Co. v. Nixon, 2 Fed. (2d) 118; Nebraska Gas & Co. v. Stromsberg, Nebraska, 2 Fed. (2d) 518; Ohio Bell Tel. Co. v. Public Utilities Comm. of Ohio, 3 Fed. (2d) 701; Brooklyn Union Gas Co. v. Prendergast, 7 Fed. (2d) 628, P. U. R. 1926A, 412; Middlesex Water Co. v. Board of Public Utility Comrs., 10 Fed. (2d) 519, P. U. R. 1926C, 707; New York Tel. Co. v. Prendergast, 11 Fed. (2d) 162, P. U. R. 1926C, 696; Brooklyn Borough Gas Co. v. Prendergast, 16 Fed. (2d) 615, P. U. R. 1927A, 200;

Columbus Gas & Co. v. Columbus, Ohio, 17 Fed. (2d) 630, P. U. R. 1927C, 639; Graff v. Seward, Alaska, 20 Fed. (2d) 816; Worchester Elec. Light Co. v. Atwill, 23 Fed. (2d) 891, P. U. R. 1929B, 1; Cambridge Elec. Light Co. v. Atwill, 25 Fed. (2d) 485, P. U. R. 1928E, 253; International R. Co. v. Prendergast, 29 Fed. (2d) 296, P. U. R. 1929B, 142; Queens Borough Gas & Co. v. Prendergast, 31 Fed. (2d) 339, P. U. R. 1928E, 791; Florida Public Utilities Co. v. West Palm Beach, 36 Fed. (2d) 318, P. U. R. 1930C, 292; Quarles v. Appleton, 45 Fed. (2d) 675.

Alabama. Montgomery Light & Co. v. Watts, 165 Ala. 370, 51 So. 725, 26 L. R. A. (N. S.) 1109, 138 Am. St. 71; Montgomery v. Smith, 205 Ala. 557, 88 So. 671, P. U. R. 1921E, 65.

Arizona. State v. Tucson Gas, Elec. Light & Co., 15 Ariz. 294, 138 Pac. 781.

Arkansas. Van Buren Water Co. v. Van Buren, 152 Ark. 83, 237 S. W. 696, P. U. R. 1922D, 183.

California. San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. 261; Pinney & Boyle Co. v. Los Angeles Gas & Co. Corp., 168 Cal. 12, 141 Pac. 620, L. R. A. 1915C, 282; Postal Tel.-Cable Co. v. Railroad Commission, 200 Cal. 463, 254 Pac. 258; Pellissier v. Whittier Water Co., 59 Cal. App. 1, 209 Pac. 593.

Colorado. Wolverton v. Mountain States Tel. & T. Co., 58 Colo. 58, 142 Pac. 165, Ann. Cas. 1916C, 776; Montezuma Water & Land Co. v. McCracken, 62 Colo. 394, 163 Pac. 286; Pueblo v. Public Utilities Comm., 68 Colo. 155, 187 Pac. 1026, P. U. R. 1920D, 327; McCracken v. Montezuma Water & Land Co., 25 Colo. App. 280, 137 Pac. 903.

Connecticut. Gallaher v. Southern New England Tel. Co., 99 Conn. 282, 121 Atl. 686, P. U. R. 1924A, 279.

Florida. Wilson v. Tallahassee Water Works Co., 47 Fla. 351, 36 So. 63.

Georgia. *Atlanta v. Atlanta Gas Light Co.*, 149 Ga. 405, 100 S. E. 439, P. U. R. 1920A, 728; *Atlanta v. Georgia R. & Power Co.*, 149 Ga. 411, 100 S. E. 442, P. U. R. 1920A, 734.

Idaho. *Bothwell v. Consumers Co.*, 13 Idaho 568, 92 Pac. 533, 24 L. R. A. (N. S.) 485; *Murray v. Public Utilities Comm.*, 27 Idaho 603, 150 Pac. 47, L. R. A. 1916F, 756, P. U. R. 1915F, 436.

Illinois. *Northern Illinois Light & Co. v. Illinois Commerce Comm.*, 302 Ill. 11, 134 N. E. 142, P. U. R. 1922E, 690; *Illinois Bell Tel. Co. v. Commerce Comm.*, 304 Ill. 357, 136 N. E. 676, P. U. R. 1923A, 330; *Illinois Bell Tel. Co. v. Commerce Comm.*, 306 Ill. 109, 137 N. E. 449.

Indiana. *New Albany v. Public Service Comm.*, 193 Ind. 416, 140 N. E. 433.

Iowa. *Des Moines v. Des Moines Water Works Co.*, 95 Iowa 348, 64 N. W. 269; *Sloan v. Cedar Rapids*, 161 Iowa 307, 142 N. W. 970; *Woodward v. Iowa R. & Light Co.*, 189 Iowa 518, 178 N. W. 549; *Mapleton, Inc. v. Iowa Public Service Co.*, 209 Iowa 400, 223 N. W. 476, P. U. R. 1929B, 359.

Kansas. *Wichita v. Hussey*, 126 Kans. 677, 271 Pac. 403, P. U. R. 1929A, 297.

Kentucky. *Potter Matlock Trust Co. v. Warren County*, 182 Ky. 840, 207 S. W. 709; *Somerset v. Gainsboro Tel. Co.*, 196 Ky. 253, 244 S. W. 758, P. U. R. 1923E, 474.

Maine. *Kennebec Water Dist. v. Waterville*, 97 Maine 185, 54 Atl. 6, 60 L. R. A. 856; *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Maine 371, 59 Atl. 537; *Hamilton v. Caribou Water, Light & Co.*, 121 Maine 422, 117 Atl. 582, P. U. R. 1922E, 801.

Massachusetts. *Boston v. Edison Elec. Illumination Co.*, 242 Mass. 305, 136 N. E. 113.

Michigan. *Lenawee County Gas & Co. v. Adrian*, 209 Mich. 52, 176 N. W. 590, 10 A. L. R. 1328, P. U. R. 1920D, 1036; *Detroit v. Michigan*

R. Comm., 209 Mich. 395, 177 N. W. 306, P. U. R. 1920D, 867.

Minnesota. *Minneapolis Gas Light Co. v. Minneapolis*, 123 Minn. 231, 143 N. W. 728.

Mississippi. *Bell v. Kaye*, 127 Miss. 165, 89 So. 910, P. U. R. 1922B, 63.

Missouri. *Home Tel. Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547; *State v. Public Service Comm.*, 269 Mo. 525, 191 S. W. 412, Ann. Cas. 1917E, 786, P. U. R. 1917C, 581; *State v. Public Service Comm.*, 291 Mo. 432, 236 S. W. 852, P. U. R. 1922C, 224; *State v. Public Service Comm.*, 310 Mo. 313, 275 S. W. 940; *State v. Busby (Mo.)*, 274 S. W. 1067, P. U. R. 1926A, 803; *Bertha A. Mining Co. v. Empire Dist. Elec. Co.*, 210 Mo. App. 622, 235 S. W. 508, P. U. R. 1922B, 643.

Montana. *Great Northern Utilities Co. v. Public Service Comm. (Mont.)*, P. U. R. 1931E, 1.

Nebraska. *Nebraska Tel. Co. v. State*, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113.

New Jersey. *North Wildwood v. Board of Public Utility Comrs.*, 88 N. J. L. 81, 95 Atl. 749, P. U. R. 1916B, 77; *Edison Storage Battery Co. v. Board of Public Utility Comrs.*, 93 N. J. L. 301, 108 Atl. 247, P. U. R. 1920B, 234; *Hackensack Water Co. v. Ridgefield*, 96 N. J. L. 526, 115 Atl. 399, P. U. R. 1922B, 639; *Hackensack Water Co. v. Board of Public Utility Comrs.*, 98 N. J. L. 41, 119 Atl. 84; *Elizabeth v. Board of Public Utility Comrs.*, 99 N. J. L. 496, 123 Atl. 358, P. U. R. 1924C, 524.

New York. *Brooklyn Union Gas Co. v. New York*, 188 N. Y. 334, 81 N. E. 141, 15 L. R. A. (N. S.) 763, 117 Am. St. 868; *People v. Willcox*, 194 N. Y. 383, 87 N. E. 517; *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L. R. A. (N. S.) 1; *People v. Public Service Comm.*, 215 N. Y. 241, 109 N. E. 252; *People v. Public Service Comm.*, 224 N. Y. 156, 120 N. E. 132, P. U. R. 1918F, 781; *Public Service Comm. v. Pavilion Nat. Gas Co.*, 232 N. Y. 146, 133 N. E.

427, P. U. R. 1922C, 74; *People v. Public Service Comm.*, 200 App. Div. 268, 193 N. Y. S. 186; *Kings County Lighting Co. v. Newton*, 202 App. Div. 473, 195 N. Y. S. 147, P. U. R. 1924A, 527, *affd.* in 235 N. Y. 599, 139 N. E. 750; *Raynor v. New York & L. I. Trac. Co.*, 166 App. Div. 927, 151 N. Y. S. 417, *affd.* in 222 N. Y. 624, 118 N. E. 1075; *Jamaica Gas Light Co. v. Nixon*, 110 Misc. 500, 181 N. Y. S. 623, P. U. R. 1920D, 860; *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206, 30 S. E. 319, 41 L. R. A. 240; *Horner v. Oxford Water & Elec. Co.*, 153 N. Car. 535, 69 S. E. 607, 138 Am. St. 681; *Corporation Commission v. Cannon Mfg. Co.*, 185 N. Car. 17, 116 S. E. 178, P. U. R. 1923D, 548.

Ohio. *State v. Cincinnati & Co.*, 18 Ohio St. 262; *Newark Nat. Gas & Co. v. Newark*, 92 Ohio St. 393, 111 N. E. 150, P. U. R. 1916F, 1033, *affd.* in 242 U. S. 405, 61 L. ed. 393, 37 Sup. Ct. 156, Ann. Cas. 1917B, 1025; *Ashtabula Gas Co. v. Public Utilities Comm.*, 102 Ohio St. 678, 133 N. E. 915, 20 A. L. R. 217, P. U. R. 1922E, 378; *Ohio Bell Tel. Co. v. Public Utilities Comm.*, 106 Ohio St. 266, 139 N. E. 857; *Lindsey v. Public Utilities Comm.*, 111 Ohio St. 6, 144 N. E. 729.

Oklahoma. *Pioneer Tel. & T. Co. v. State*, 40 Okla. 417, 138 Pac. 1033; *Durant v. Consumers Light & Co.*, 71 Okla. 282, 177 Pac. 361, P. U. R. 1919C, 46; *Nowata County Gas Co. v. State*, 72 Okla. 184, 177 Pac. 618, P. U. R. 1919C, 40; *Muskogee Gas & Co. v. State*, 86 Okla. 58, 206 Pac. 242, P. U. R. 1922E, 514; *Southern Oil Corp. v. Yale Nat. Gas Co.*, 89 Okla. 121, 214 Pac. 131, P. U. R. 1923E, 418; *Bristow Commercial Club v. Bristow Gas Co.*, 95 Okla. 4, 217 Pac. 201, P. U. R. 1923E, 841; *Consumers Gas Co. v. Corporation Commission*, 95 Okla. 57, 219 Pac. 126, P. U. R. 1924A, 743; *McAlester Gas & Co. v. Corporation Commission*, 102 Okla. 118, 227 Pac. 83; *Shaffer Oil & Co. v. Creek County Gas Co.*, 114 Okla. 258, 246 Pac. 630, P. U. R. 1926E, 289; *Oklahoma Gas*

& Co. v. Grain Exchange Bldg. Co., 131 Okla. 205, 268 Pac. 248, P. U. R. 1928D, 574.

Oregon. *Hillsboro v. Public Service Comm.*, 97 Ore. 320, 187 Pac. 617, 192 Pac. 390.

Pennsylvania. *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260; *Scranton v. Public Service Comm.*, 268 Pa. 192, 110 Atl. 775, P. U. R. 1920F, 661; *Public Service Comm. v. Beaver Valley Water Co.*, 271 Pa. 358, 114 Atl. 373, P. U. R. 1921E, 596.

Texas. *Houston Elec. Co. v. Houston (Tex. Civ. App.)*, 212 S. W. 198, P. U. R. 1919F, 134; *West v. Probst (Tex. Civ. App.)*, 251 S. W. 289, P. U. R. 1923E, 270.

Utah. *Logan City v. Public Utilities Comm. (Utah)*, 296 Pac. 1006, P. U. R. 1931C, 5.

Virginia. *Petersburg Gas Co. v. Petersburg*, 132 Va. 82, 110 S. E. 533, 20 A. L. R. 542, P. U. R. 1922C, 172; *Commonwealth v. Shenandoah River Light & Corp.*, 135 Va. 47, 115 S. E. 695, P. U. R. 1923C, 593; *Roanoke Water Works Co. v. Commonwealth*, 140 Va. 144, 124 S. E. 652.

Washington. *Twitchell v. Spokane*, 55 Wash. 86, 104 Pac. 150, 24 L. R. A. (N. S.) 290, 133 Am. St. 1021; *State v. Public Service Comm.*, 76 Wash. 492, 136 Pac. 850; *State v. Public Service Comm.*, 101 Wash. 601, 172 Pac. 890, P. U. R. 1918E, 277; *State v. Public Service Comm.*, 107 Wash. 17, 180 Pac. 913; *State v. Superior Court for Spokane County*, 110 Wash. 396, 188 Pac. 404; *North Coast Power Co. v. Kuykendall*, 117 Wash. 563, 201 Pac. 780, P. U. R. 1922B, 320.

West Virginia. *Huntington v. Public Service Comm.*, 89 W. Va. 703, 110 S. E. 192, P. U. R. 1922C, 558; *Bluefield v. Public Service Comm.*, 91 W. Va. 442, 113 S. E. 745, P. U. R. 1923A, 678; *Huntington v. Public Service Comm.*, 101 W. Va. 378, 133 S. E. 144, P. U. R. 1926D, 835; *Harrisville v. Public Service Comm.*, 103 W. Va. 526, 138 S. E. 99, P. U. R. 1927E, 11.

§ 551. **Rates for future fixed by contract or legislature, not by courts.**—The application of this principle to the question of providing service by municipal public utilities is made in the case of *Pocatello, Idaho v. Murray*, 173 Fed. 382, decided in 1909, where the court said: "But I am further of the opinion that even if it should be conceded that the statute of Idaho above referred to is applicable to the contract under which the defendant is supplying water to the city of Pocatello, and so prescribes the method by which that city may change the schedule of water rates named in the ordinance, this court would still be without jurisdiction to fix and promulgate the water rates and charges, which the defendant shall have the right to collect, during the next three years, under his franchise. The fixing of such rates, when not a matter of contract, 'is a legislative or administrative, rather than a judicial function.'"⁴

That rate making is legislative or contractual, and not judicial and that the court may only pass upon the question of reasonableness is clearly decided in the case of *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 66 L. ed. 538, 42 Sup. Ct. 264, P. U. R. 1922B, 752: "Mere past success could not support a demand that it continue to operate indefinitely at a loss. The public has no such right in respect of private property, although dedicated to public use. When it became clear that the prescribed rate had yielded no fair return for more than a year, and that this condition would almost certainly continue for many months, the company was clearly entitled to relief. * * * Rate making is no function of the courts, and should not be attempted, either directly or indirectly. After declaring the eighty-cent rate confiscatory, the court should not have attempted, in effect, to subject the company for an indefinite period to some unknown rate to be proclaimed in the future, upon consideration of conditions then prevailing."

§ 552. **Rates presumed reasonable.**—That reasonableness is a judicial limitation which is placed upon the right of the legislature to fix rates is well expressed in the case of *Palatka Waterworks v. Palatka, Florida*, 127 Fed. 161, decided in 1903, although the court also observed that any rate so fixed should not be set aside by the court as unreasonable unless it is such with-

Wisconsin. *Madison v. Madison Gas &c. Co.*, 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 116 Am. St. 944, 9 Ann. Cas. 819; *La Crosse v. Railroad Commission*, 172 Wis. 233, 178 N. W. 867, P. U. R. 1921A,

22; *Eau Claire v. Wisconsin-Minnesota Light &c. Co.*, 178 Wis. 207, 189 N. W. 476.

⁴ *Reagan v. Farmers Loan &c. Co.*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047.

out question, in which case, however, the courts will act for the purpose of protecting the property rights of the municipal public utility, for as the court in this case said: "Conceding the legislative right to regulate the charges to be made by the complainant for water, such regulation must be within reasonable limits. It could not lawfully go to the extent of depriving the complainant of all income from its investment, and in effect confiscate its property. The power to regulate could not legally be used as the power to destroy. The question of the reasonableness of such regulations is one for judicial examination and determination.⁵ * * * But the judiciary ought not to interfere with rates established under legislative sanction, where the legislature has the right to act, unless they are plainly and palpably so unreasonable as to make their enforcement equivalent to depriving the complainant of reasonable returns on its investment; but judicial interference is proper when the case shows an attack upon the rights of property, under the guise of regulating it, which will make the plaintiff's property valueless in his hands, by annulling or making inoperative existing contracts."⁶

The leading case of *San Diego Land &c. Co. v. National City, California*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804, decided in 1899, in defining what constituted reasonable rates also observed on the point in question, "that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation, as, under all the circumstances, is just, both to the owners and to the public."

While rates are presumed to be reasonable the courts will not find them so where they are insufficient to attract the necessary capital to extend and carry on the service, for as the court said in the case of *Landon v. Public Utilities Comm. of Kansas*, 234 Fed. 152, P. U. R. 1917A, 120: "A supply of gas adequate to the reasonable needs of the customers of the natural gas company for domestic lighting, cooking, and heating is the real desideratum in this case. Without it no rate will be compensatory. The company now has no such supply. It can not get such

⁵ *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198.

⁶ *San Diego Land &c. Co. v. National City, California*, 174 U. S.

739, 43 L. ed. 1154, 19 Sup. Ct. 804; *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198.

a supply without adequate extensions to its pipe lines. It can make such extensions by the expenditure of a reasonable amount of money. It can not make such extensions without such money, and it can not get the money to make them without compensatory rates for the gas it procures and sells. Any rate which will not compensate it for making the necessary extensions to secure such a supply, for paying its other necessary expenses of operation and a reasonable income on the value of its property, is unavoidably confiscatory, because without these extensions it must lose its customers, cease its operation, and the value of its property must greatly decrease."

The reasonableness of a rate, although fixed by statutory enactment, becomes a judicial question when it is shown to be confiscatory, and the court will set it aside because of that fact. That it is confiscatory becomes evident when the maximum rate fixed is less in a sparsely settled municipality than that permitted in a densely populated community, notwithstanding the cost of service is greater in the sparsely settled municipality, other conditions being the same. This principle is established and discussed at length in the case of *Queens Borough Gas & Electric Co. v. Prendergast*, 31 Fed. (2d) 339, P. U. R. 1928E, 791, as follows: "Contemporaneously with the commencement of this action, every other company supplying gas in the city of New York commenced similar actions for the same relief as to them. Of such actions, brought in this, the eastern district of New York, this action was assigned to be tried last. Under this calendar arrangement all of the other actions were tried before this trial could be commenced. Hearings herein were commenced on September 7, 1926, and closed on August 18, 1927. The final briefs were filed with the special master on January 19, 1928. * * * The statute involved in this cause, chapter 899 of the Laws of 1923, effective June 2, of that year, added a new section, 67-a, to the Public Service Commission Law (Consol. Laws, c. 48), which read as follows: 'A gas corporation engaged in the business of manufacturing, furnishing or selling illuminating gas in a city containing a population of one million or over shall not charge or receive for gas furnished or sold in such city a sum per one thousand cubic feet in excess of one dollar, nor furnish in such city gas of a standard less than six hundred and fifty British thermal units per cubic foot, measured under normal conditions of temperature and atmospheric pressure. The public service commission, notwithstanding any other provision of this chapter, shall not allow a rate or charge in the

case of such cities in excess of such sum.' * * * The act of the legislature abolished the graduated scale, and brought the rates for all groups at least within the city of New York down to one dollar (ten cents less than the lowest rate fixed by the public service commission). It, at the same time, also increased very materially the British thermal unit standard required of plaintiff. * * * It is now settled that the prescription of the rate and standard by the public service commission and the acceptance thereof by the gas company do not constitute a contract within the meaning of section 10, article 1, of the Constitution, even where the period for which the rate shall continue in force has been prescribed and accepted under specific legislative authority and the continuance of the rate for such period has been stipulated as one of the terms and conditions of the company's agreement to accept the rate at all. *New York & Queens Borough Gas Co. v. Prendergast* (D. C.), 1 Fed. (2d) 351, appeal dismissed 268 U. S. 708, 45 Sup. Ct. 641, 69 L. ed. 1169; *Bronx Gas & Electric Co. v. Prendergast* (D. C.), 1 Fed. (2d) 377, appeal dismissed 273 U. S. 772, 47 Sup. Ct. 102, 71 L. ed. 884; *Consolidated Gas Co. v. Prendergast* (D. C.), 6 Fed. (2d) 243, modified and affirmed 272 U. S. 576, 47 Sup. Ct. 198, 71 L. ed. 420; *Kings County Lighting Co. v. Prendergast* (D. C.), 7 Fed. (2d) 192, modified and affirmed 272 U. S. 579, 47 Sup. Ct. 199, 71 L. ed. 421; *Brooklyn Union Gas Co. v. Prendergast* (D. C.), 7 Fed. (2d) 628, modified and affirmed 272 U. S. 579, 47 Sup. Ct. 199, 71 L. ed. 421; *New York & Richmond Gas Co. v. Prendergast* (D. C.), 10 Fed. (2d) 167; *Brooklyn Borough Gas Co. v. Prendergast* (D. C.), 16 Fed. (2d) 615. Hereafter in this opinion this series of cases will be referred to and indicated by the phrase 'Gas cases, supra.' * * * In each of the Gas cases, supra, the statute has been held to be confiscatory as to the plaintiffs therein. * * * It is regrettable to note that that legislature made no special appropriation for the employment of engineers, accountants, and real estate experts to facilitate the labors of the conduct of the defense of this and the other suits. * * * This cause presents two problems of apportionment: The first, as to that between plaintiff's gas business and its electric business; and the second, of its gas business between so much of it as serves the consumers located in the county of Nassau and outside of New York City, and so much of it as serves the consumers located in the county of Queens within New York City. No serious issue is presented as to the apportionment between the electric business and the gas business. The amount of

revenues and the amount of fixed capital tended to approximate each other in the two departments. It has been the plaintiff's practice to charge to each department the expenditures for operating purposes and for capital which are identifiable with that particular department, and to apportion between the two departments, on the basis of fifty per cent to the gas department and fifty per cent to the electric department, such charges both for operation and for capital as are incurred for both departments in common. * * * The territory served is a contiguous geographical area divided only by a county line. The statute under review affects only cities having a population of 1,000,000 or more. The consumers of the plaintiff, therefore, who are located in the county of Nassau, are wholly unaffected by the statute. * * * The rate of one dollar and thirty cents and standard of 537 B. t. u. prescribed by the public service commission of 1922 for the plaintiff still stands for Nassau county consumers, while the rate for Queens county consumers was reduced to one dollar and the standard increased to 650 B. t. u. by the legislature. By far the greater number of consumers served by the plaintiff in both counties consume less than 100,000 cubic feet per month. The public service commission rate of 1922 authorized the plaintiff to charge such consumers, irrespective of the county of their residence, a one dollar and thirty cent rate; the statute says that those located in Queens shall only pay a one dollar rate. Yet, so far as this plaintiff is concerned, the consumers in both counties are served from one central plant, located in Queens; they are served by the identical distribution system; the same raw materials are consumed for the gas to be used in both counties; the same employees of the plaintiff serve all the consumers, irrespective of whether they live in Queens or in Nassau; and the consumers of both counties receive the benefit of a single gas system, with a unified control and a single system of production and distribution. The statute under consideration cuts the plaintiff's system in two. It would, perhaps, be more accurate to say that it does not cut the system in two, it merely divides plaintiff's consumers into two groups, one group of which is to pay a one dollar rate and the other to pay a one dollar and thirty cent rate. No reason for the discrimination appears upon the face of the statute. Nor has the plaintiff or either of the defendants produced any proof of the grounds upon which the discrimination received the legislative sanction. Of the legislative power to properly prescribe different rates for different counties there is, I take,

no doubt. Of the wisdom of prescribing two widely divergent rates for two contiguous counties, both very much alike in density of population, both very much alike in the character of service, and both served by the identical gas plant, there might be considerable debate. * * * That part of Queens county bears far more resemblance to Nassau county than it does * * * to the counties of New York, Kings, and the Bronx, all of which have great density of population, with scores of gas meters located within very short distances. In the New York City district served by the plaintiff the population is sparse; meters are, for the most part, spread out. The same condition prevails in Nassau county. * * * But it claims that, as the system of operations is unitary, there is no need for apportionment. Because it has not offered proof of allocation, or excluded properties located in Nassau from its proofs, the defendants assert that there has been a failure of proof upon the part of the plaintiff. There might be considerable force to this contention, if adjudication of the present case depended solely upon the valuation of the portions of the plaintiff's property attributable to the respective geographical areas. It does not. The proof shows that, at the time that the statute under review took effect, its operating costs, exclusive of the value of its properties, amounted to approximately ninety-nine cents per 1,000 cubic feet. This cost to produce and sell the gas applies to the consumers in both counties alike. It applies as against the one dollar rate fixed by the statute. It applies to a lesser B. t. u. standard than that prescribed by the statute. For these facts alone, the statute must be held confiscatory as to the plaintiff. * * * When the rates are differentiated by nothing more substantial than an artificial county line, the diversity is difficult to justify. In a case like the present, a disposition to shift values would be quite natural; one party charging every item it possibly could to the lower rate base, and the other party seeking to charge every item it possibly could to the higher rate base. * * * It is not the duty of the court in this case to work out, even if it could upon the record as it stands, a formula for the rates to be charged. That would be doing what the cases say that the courts should not do. In any event this court is not called upon to do that which neither the public service commission, nor the legislature of the state of New York, nor the parties to this action have done. * * * The plaintiff's proof as to its operating expenses is practically undisputed. Its actual expenditures are shown by its books, duly admitted into evidence. * * *

Defendants in their briefs criticize the proofs offered by the plaintiff as to the value of its lands. But the way to meet the proof, where the credibility of the witness is not otherwise impeached, is by proof to the contrary. * * * I do not believe that plaintiff's estimate of what it requires for working capital should be cut below the amount asked by it, \$558,996. * * * I am of the opinion that the plaintiff is entitled, upon the proof, to an allowance for going value of \$750,000. * * * The cost to restore to a condition as if new, \$32,626.47 must, of course, be deducted. * * * The value of plaintiff's property, used and useful in its gas business as of the time of the commencement of this action, was therefore the sum of \$8,142,757.53. The net additions to the property since the commencement of this action and the total value as of the following dates are thus indicated. * * * The uncontradicted testimony showed, and the cases warrant in holding, that the plaintiff is entitled to earn an eight per cent return upon the value of its property (Gas cases, *supra*). * * * The statute, if enforced as to rate above and in that part of the territory embraced in New York City above, would not permit of any return whatever to the plaintiff over its mere operating expenses. The evidence is so convincing that no experiment was required by plaintiff with either rate or standard, or both together." Concerning the above quotation from the master's report, the court said: "The defendants now charge that the division is arbitrary, but they have adduced no specific instances of erroneous apportionment. The master's decision on this subject is correct."

§ 553. Reasonableness of rates question of fact—Presumption.—Where there is a question of fact as to whether the rate in the particular case is a proper one the court will indulge the presumption in favor of the rate so fixed and refuse to interfere with it, for as the Supreme Court of the United States, in the case of *Louisville, Kentucky v. Cumberland Tel. & T. Co.*, 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. 741, decided in 1912, observed: "But when it is remembered what clear evidence the court requires before it declares legislation otherwise valid void on this ground, and when it is considered how speculative every figure is that we have set down with delusive exactness, we are of opinion that the result is too near the dividing line not to make actual experiment necessary."

In *Chicago & C. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 177, 12 Sup. Ct. 400, the court said: "The extent of judicial interference is protection against unreasonable rates."

The case of *New Memphis Gas & Light Co. v. Memphis, Tennessee*, 72 Fed. 952, decided in 1896, furnishes an accurate statement in forceful language which stands unchallenged to the effect that: "The question of the reasonableness of a rate of charge is eminently a question for judicial investigation, requiring due process of law for its determination. And to deprive a company of the power of charging reasonable rates for the manufacture and sale of gas is to deprive it of the use of its property, and, in effect, of the property itself, without the due process of law. * * * And the very use of the term 'regulation' implies that an investigation shall be made; that an opportunity to present the facts shall be furnished; that, when the facts are established, they shall, by the regulating power, be given due consideration; and that such action as shall be taken in view of these facts, thus ascertained, shall be just and reasonable, and such as enables the company to maintain its existence, to preserve the property invested from destruction, and to receive, on the capital actually and bona fide invested in the plant, a remuneration or dividend corresponding in amount to the ruling rates of interest."

The duty devolving upon the court of deciding between the contending parties only as to whether a particular rate already fixed is fair and equitable is well expressed in the case of *Spring Valley Waterworks Co. v. San Francisco*, 165 Fed. 667, decided in 1908, as follows: "If the supervisors have the power, and it is their duty to prescribe just and reasonable rates, and the court has the power to decide whether such rates are reasonable, and to annul ordinances in which the rates prescribed are unjust and unreasonable, it must follow that 'the court has no power,' as Judge Morrow says in *Spring Valley Waterworks v. San Francisco*, *infra*, 'to diminish the measure of what is just compensation in any degree.' The court must ascertain the fact; ascertain whether the ordinance crosses the line which separates that which is just and reasonable from that which is unjust and unreasonable, and so declare."

By way of defining what rates are reasonable and what they must cover, the court, in the leading case of *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L. R. A. (N. S.) 1, said: "The company starts out with the 'bare bones' of the plant, to borrow Mr. Justice Lurton's phrase in *Omaha Water Works Case*, 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. 615, *supra*. By the expenditure of time, labor, and money, it coordinates those bones into an efficient working organism, and acquires a paying busi-

ness. The proper and reasonable cost of doing that, whether included in operating expenses or not, is as much a part of the investment of the company as the cost of the physical property.

* * * If a deficiency in the fair return in the early years was due to losses or expenditures which were reasonably necessary and proper in developing efficiency and economy of operation and in establishing a business, it should be made up by the returns in later years. If there was a fair return from the start the corporation has received all it was entitled to, irrespective of how much of the earnings may have been diverted to the building up of the business. * * *

Three courses seem to be open with respect to rate making, viz.: (1) To charge rates from the start sufficient to make a fair return to the investor and to pay the development expenses from earnings, a course likely to result in prohibitive rates, except under rare and favorable circumstances; (2) to treat the development expenses as a loss to be recouped out of earnings, but to be spread over a number of years, in other words, as a debt to be amortized—that involves complications, but would seem to be fairer to the public, and certainly more practical than the first; (3) to treat the development expenses, whether paid from earnings or not, as a part of the capital account for the purpose of fixing the charge to the public. The last course would seem to be fairest to both the public and the company, as well as the most practical.

* * * Of course, a reasonable need for the service from the start and reasonably good management are assumed. While, within reasonable limits, service may be provided for anticipated needs, a company should not construct a plant in a wilderness and, after a city has built around it, expect to recoup its losses while waiting, nor should it expect to recoup losses from bad management. I do not include in the latter mere mistakes or errors in judgment which are almost inevitable in the early stages of any business. The fair return is to be computed on the actual investment, not on an overissue of securities, and the failure to pay dividends to the investors must be due to the causes under consideration, not to an accumulation of a surplus or to expenditures for permanent additions or betterments, which are included in the appraisal of the physical property; in other words, the actual net earnings are to be taken."

The rate as fixed by the parties to the contract is presumed to be reasonable and will be upheld unless shown to be unreasonable in the interest of the public welfare, for as the court said in the case of *Arkansas Natural Gas Co. v. Arkansas Railroad*

Comm., 261 U. S. 379, 67 L. ed. 705, 43 Sup. Ct. 387, P. U. R. 1923C, 714: "While a state may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts (*Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 248 U. S. 372, 375, 63 L. ed. 309, 311, 39 Sup. Ct. 117, 9 A. L. R. 1420, P. U. R. 1919C, 60; *Producers Transp. Co. v. Railroad Commission*, 251 U. S. 228, 232, 64 L. ed. 239, 242, 40 Sup. Ct. 131, P. U. R. 1920C, 574), there is quite clearly, no principle which imposes an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking. The power to fix rates, when exerted is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed, the exertion of legislative power solely to that end is precluded by the contract-impairment clause of the constitution. The power does not exist per se. It is the intervention of the public interest which justifies, and, at the same time, conditions, its exercise."

Where a public utilities commission sets aside a rate fixed by a franchise, the court will presume that the commission found the franchise rate unreasonable without a special finding to that effect, but all branches of the service must yield a reasonable return on the investment and any rate which does not produce such a return will be set aside as confiscatory, for as the court said in the case of *Logan City v. Public Utilities Comm. (Utah)*, 296 Pac. 1006, P. U. R. 1931C, 5: "The first objection is that the commission failed to make any finding with respect to the allegation that the company is bound by the schedule of rates set out in the franchise ordinance of the city, which rates are lower than the schedule of rates approved by the commission.

* * * This section [Comp. Laws 1917, § 4789] prohibits a utility from establishing or maintaining discriminatory or preferential rates or charges, or any unreasonable difference as to rates, charges, or service as between localities or classes of service. No point is made that there is a difference or discrimination between the two exchanges as to rates, charges, or service, but merely that the rate of return on investment is less from the one than from the other. * * * This is in effect a finding that the rates were unreasonable and inadequate. The commission has not indicated what percentage of return is reasonable and adequate, but the cases hold, without exception, that rates yielding so low a rate of return as here are not adequate or reasonable.

It is well settled that each rate should be compensatory, and that a utility can not be required to perform service at a rate which is confiscatory."

The federal courts have defined the rule of "fair return on the present value of the property used by the company," and have indicated that current values and cost of production must be considered as well as a forecast taken as to future values and costs; and where the commission fails to do this, its action will be enjoined, for as the court said in the case of Worcester Electric Light Co. v. Atwill, 23 Fed. (2d) 891, P. U. R. 1929B, 1: "The rule adopted in such cases by the Supreme Court of the United States is that there should be a fair return on the present value of the property used by the company (S. W. Tel. Co. v. Pub. Serv. Comm., 262 U. S. 276, 43 Sup. Ct. 544, 67 L. ed. 981, 31 A. L. R. 807; Bluefield Co. v. Pub. Serv. Comm., 262 U. S. 679, 43 Sup. Ct. 675, 67 L. ed. 1176, and cases cited), and that, 'in determining present value, consideration must be given to prices and wages prevailing at the time of the investigation; and, in the light of all the circumstances, there must be an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future' (McCardle v. Indianapolis Co., 272 U. S. 400, 408, 47 Sup. Ct. 144, 147 (71 L. ed. 316). It is apparent from the foregoing quotations that this way of computing the value of property on which return is to be allowed was not followed. The decision of the department is contrary to the decisions of the Supreme Court of the United States."

The reasonableness of a rate, fixed by the commission, which is a question of fact, will be presumed and the court will not set it aside on evidence furnished by the affidavits of the party asking for such relief. The proper rate of return on the investment varies with the time and place when and where the rate obtains, and on these questions the commission is permitted to exercise a wide discretion, for as the court said in the case of Cambridge Electric Light Co. v. Atwill, 25 Fed. (2d) 485, P. U. R. 1928E, 253: "The rates fixed by the commission are presumed to be just and reasonable. The burden is upon the plaintiff to show that they are unjust, unreasonable, or confiscatory." * * * Governmental acts within the general power of the state are presumptively valid, and ought not to be interfered with by a federal court upon a mere balance of possible injuries. To warrant interference, it must appear that there is a reasonable probability that the utility will prevail upon final hearing. The ques-

tion is whether the plaintiff makes out a case within these requirements. The order which is attacked reduced its rate on domestic and commercial lighting from eight cents to five and one-half cents per kilowatt hour. * * * We are not dealing with the case on full proofs, but only in a preliminary way and on the evidence as it stands. No sufficient reason is shown for rejecting the decision of the department, which, as above stated, is presumptively correct, in favor of affidavits submitted by the plaintiff, largely from the same witnesses whose testimony in extenso was regarded as unconvincing by the commissioners. As to the rate of return: On this point also the department had before it, as we understand, substantially the same evidence as is before us, viz., that the rate of return should be eight per cent. This evidence was rejected, and the department adopted, as stated in its decision, a rate of six per cent. This also is primarily a question of fact depending upon a number of factors. What would be a fair return for a company in one locality at a certain period might be inadequate or excessive for other companies differently situated. The rate of interest has also to be taken into consideration. *Bluefield Co. v. Public Service Comm.*, 262 U. S. 679, 693, 43 Sup. Ct. 675, 67 L. ed. 1176. On the plaintiff's own figures, it will get a return under the new rate of about five per cent on its valuation. On the figures of the department its return will be about seven per cent. We are not at present satisfied that a return of less than eight per cent would ipso facto be confiscatory, or that the return which the plaintiff will actually obtain under the new rate will be of that character. These points should await final hearing and possibly the results of actual experience."

The court will presume that a rate is reasonable, provided it is based upon a sufficient finding of facts, but where the commission and the statutory court made no distinction between the intrastate and interstate earnings and investments of the utility, which was rendering both services, the case will be remanded for further proceedings and for the proper division and allocation of the two classes of service and the investments necessary to render each. Such findings of facts are necessary in order that the court may determine whether the proposed rate is reasonable or confiscatory under the federal Constitution. This principle and the grounds on which it is based are well expressed as follows in the case of *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 75 L. ed. 255, 51 Sup. Ct. 65, P. U. R. 1931A, 1, where the court said: "At the threshold of the discussion, we are met

with the fact that, in these findings, the commission and the court made no distinction between the intrastate and the interstate property and business of the company. * * * The company introduced evidence separating the intrastate and interstate business and also the intrastate exchange business. While the court regarded these computations as correct, and approved the method in which they had been made, still the court made no specific findings based on a separation of the intrastate and interstate property, revenues and expenses, but determined the issue on the basis of the total Chicago property of the company. * * * The separation of the intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation. * * * But the interstate tolls are the rates applicable to interstate commerce, and neither these interstate rates nor the division of the revenue arising from interstate rates was a matter for the determination either of the Illinois commission or of the court dealing with the order of that commission. The commission would have had no authority to impose intrastate rates, if as such they would be confiscatory, on the theory that the interstate revenue of the company was too small and could be increased to make good the loss. The interstate service of the Illinois Company, as well as that of the American Company, is subject to the jurisdiction of the interstate commerce commission, which has been empowered to pass upon the rates, charges and practices relating to that service. * * * The proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction, and this can not be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority. In view of the questions presented in this case, the validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed. * * * It is obvious that, unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden—to what extent is a matter of controversy. We think that this subject requires further consideration, to the end that by some practical method the different uses of the property may be recognized and the return properly attributable to the intrastate

service may be ascertained accordingly. * * * The point of the appellants' contention is that the Western Electric Company, through the organization and control of the American Company, occupied a special position with particular advantages in relation to the manufacture and sale of equipment to the licensees of the Bell system, including the Illinois Company, that is, that it was virtually the manufacturing department for that system, and the question is as to the net earnings of the Western Electric Company realized in that department and the extent to which, if at all, such profit figures in the estimates upon which the charge of confiscation is predicated. We think that there should be findings upon this point. At the time to which the evidence was primarily directed (1923), there was in force a 'license contract' between the Illinois Company and the American Company, granting a license under the patents owned or controlled by the American Company and providing for the payment to the latter of four and one-half per cent of the gross revenues of the Illinois Company covering the rental for the use of instruments and for engineering, financial and advisory services. * * * In view of the findings, both of the state commissions and of the court, we see no reason to doubt that valuable services were rendered by the American Company, but there should be specific findings by the statutory court with regard to the cost of these services to the American Company and the reasonable amount which should be allocated in this respect to the operating expenses of the intrastate business of the Illinois Company in the years covered by the decree. * * * As the interstate commerce commission has not acted finally in the matter, we are not now called upon to consider the scope of its authority in relation to depreciation charges, but we are of the opinion that, in any event, until action has been taken which could be deemed validly to affect the amount to be charged to depreciation in connection with intrastate business so as to affect intrastate rates, the prerogative of the state to prescribe such rates, and the jurisdiction and duty of the statutory court in considering their validity to determine the amount properly allowable for depreciation in connection with the intrastate business, are not to be gainsaid. Compare *Railroad Comrs. v. Great Northern R. Co.*, 281 U. S. 412, 74 L. ed. 936, 50 Sup. Ct. 391. Accordingly, the court should make appropriate findings with respect to the amount to be allowed in this case as an annual charge for depreciation in connection with the intrastate business. Upon the hypotheses adopted by the statutory court, the return to the Illinois Com-

pany was found to be inadequate, but what would be a proper rate of return was not determined. In determining what is a confiscatory regulation of rates, it is necessary to consider the actual effect of the rates imposed in the light of the utility's situation, its requirements and opportunities. * * * In order to determine this question, the court should find the rate of return which was realized from the intrastate business and the rate of return which it is fair to conclude would have been realized from that business under the prescribed rates."

§ 554. **Limitation of reasonableness.**—That the court can not fix the rate itself, however, but is limited in its jurisdiction in determining whether a rate when fixed is reasonable and proper, is the generally accepted rule as expressed in the case of *Nebraska Tel. Co. v. State*, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113, decided in 1898, as follows: "Here the court determines that the respondent shall perform for the relator a specific service for three months for a specific sum of money. This, in effect, was a determination by the court that three dollars per month was a reasonable compensation for the service required to be rendered by the respondent, and a fixing of the compensation for such service at that price for the future. We think the history of the legislation of the entire country shows that the power to determine what compensation public service corporations may demand for their services is a legislative function, and not a judicial one."

That there must be a like limitation on the commission in passing on the rate as fixed by the utility itself is well stated in the case of *Wisconsin-Minnesota Light & Power Co. v. Railroad Commission*, 183 Wis. 104, 197 N. W. 363: "The commission arrived at its conclusion by substituting for the experience of the company estimates as to future revenues and future operating costs. In setting aside the existing rate the commission can not substitute for the experience of the company its estimates as to future revenues and operating costs."

The prevailing rate of interest on other investments and the increased costs of items required to furnish the service are properly considered in deciding on the reasonableness of rates, as is well stated in the case of *Lincoln Gas & Electric Light Co. v. Lincoln, Nebraska*, 250 U. S. 256, 63 L. ed. 968, 39 Sup. Ct. 454, P. U. R. 1919E, 219, 1919F, 138: "We can not approve the finding that no rate yielding as much as six per cent upon the invested capital could be regarded as confiscatory, in view of the undisputed evidence, accepted by the master, that eight

per cent was the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other business in the vicinity; seven per cent being the 'legal rate' of interest in Nebraska. Complainant had not such a monopoly nor were its profits 'virtually guaranteed' in such a sense as to permit the public authorities to restrict it to a return of six per cent upon its invested capital. * * * It is a matter of common knowledge that, owing principally to the World War, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

To the same effect that the return must equal the interest rates on like investments the court in construing reasonableness of rates in the case of *Joplin Gas Co. v. Public Service Comm. of Missouri*, 296 Fed. 271, P. U. R. 1924D, 137, said: "In determining what rate will enable a gas company, or other public utility, to earn a fair return, its property used is to be taken at its fair value at the time the rate is in force. Under the rule of the Supreme Court that the present fair value of the property of a gas company used in the public service is to be taken as the basis for fixing reasonable rates, the company is entitled to such value, even though it has been increased as the result of enhanced war prices. Neither the original cost nor the present cost of reproduction is always a fair measure of the present value of the physical property of a gas company for rate-making purposes; but, where the plant has been in use for a number of years, an allowance must be made from either cost for depreciation. *City of Minneapolis v. Rand et al.* (C. C. A.), 285 Fed. 818. * * * The rate of interest for loans on approved security in Joplin and its vicinity is at least six per cent. The return on investments in other business undertakings, which are attended by corresponding risks and uncertainties, is greater than that. Certainly capital and credit would not be attracted to an enterprise of this nature, the returns from which are known to be less certain and safe. In my opinion, the rate prescribed by the commission's order is unreasonable, and therefore confiscatory."

While the court may not fix rates it will find a rate unreasonable which fails to provide a reasonable return on the necessary investment, for as the court said in the case of *Ohio Bell Tel. Co. v. Public Utilities Comm.*, 106 Ohio St. 266, 139 N. E. 857: "This court is not a rate-fixing body. Its duty is revisory in ascertaining the lawfulness and reasonableness of the rates fixed by the commission. However, the factors that enter into rate fixing present a legal question. * * * When it is considered that the federal income tax must be paid out of five and seventenths per cent, the conclusion is unavoidable that the net per cent return is wholly inadequate. The finding of the commission permits the deduction of local taxes, but not the federal income tax. It is difficult to conceive why one is not as much a charge upon the utility, and a burden upon its revenues, as the other. The one enters as much into the company's cost of service as the other."

Under the power to regulate, the railroad commission does not have the power to prohibit, and where an order has this effect and is arbitrary, unreasonable, and improper, it will be set aside, as is indicated in the case of *Postal Telegraph-Cable Co. v. Railroad Commission*, 200 Cal. 463, 254 Pac. 258, where the court said: "Regulations of the state must not be arbitrary, unreasonable, nor such as have the effect of excluding the company from the state or forbidding it to carry on its business therein. A state can not so exclude or prohibit either directly or indirectly. * * * Under this provision, the authorities seem to as conclusively establish that the power of the national government is exclusive, subject to the right of the state, under its police power, to make certain reasonable regulations as to the manner in which the business of the telegraph company shall be conducted. The order here sought to be annulled amounts to an injunction entirely suspending the doing of intrastate business over the Imperial Valley extension of the telegraph company's line. It does not, therefore find support in the exercise of the police power to regulate, but amounts to an attempt to exercise a power to prohibit. For this reason, the order of the commission and the provisions of section 50 (b) of the Public Utilities Act, if applied to the petitioner here, violate petitioner's rights under the federal Constitution and the act of congress which give effect to its provisions relating to post offices and post roads."

Although the expediency of encouraging or continuing competition between natural monopolies is generally discarded by the

attitude of our courts, which favor control and regulation by commissions, where such a condition of competition exists because it was created by local authorities in the fond hope that its effects would prove beneficial, the courts, while decrying such a plan of control, recognize that the condition was created with legal authority and will protect the utility in its rights to insist on reasonable rates for its service by denying the commission the power to fix rates that are unreasonably low, because confiscatory. While admitting that it could fix minimum as well as maximum rates the courts will insist that any rate so fixed must be reasonable. And to avoid the effects of cut-throat competition by rates that are unreasonably low and confiscatory, the courts will enjoin such rates. This principle is recognized and discussed as follows in the case of *Great Northern Utilities Co. v. Public Service Comm. of Montana*, 52 Fed. (2d) 802, P. U. R. 1931E, 134: "This case is somewhat unique in that, believe it or not, plaintiff resists defendant's order to raise rates. * * * Without further comment it is observed that the complaint, motion, plaintiff's report, and the commission's report of its hearing in evidence presented, suffice to maintain the allegation of limited or insufficient field for more than one of the rival utilities occupying it; that reasonable rates will not afford fair returns to both or more than one of them. * * * The power existing, the necessity and purpose of its exercise, is for legislative and not judicial judgment. *German, &c. Co. v. Kansas*, 233 U. S. 417, 34 Sup. Ct. 612, 58 L. ed. 1011, L. R. A. 1915C, 1189. Always when in issue, however, it is for the courts to determine whether the power has been legally exercised, reasonably in regulation, and not arbitrarily and abused in disregard of its limitations aforesaid. Even as constitutional laws may be administered unconstitutionally the lawful power to regulate may be abused and result in unlawful orders. It is believed the latter is the instant case. That a minimum rate may be fixed so high it will repel all patronage, destroy the utilities' investment, and deprive it of property without due process of law, is as clear as that a maximum rate may be fixed too low for fair returns to the same unlawful end. Both would be lawful power exercised unreasonably, resulting in illegal orders, subject to be judicially annulled. The power to regulate is not the power to destroy useful and harmless enterprise, but is to protect, foster, promote, preserve, control with regard to the present and future interests of the utility, its patrons, and the public. See *Dayton, &c. Ry. v. United States*, 263 U. S. 478, 44 Sup. Ct. 169, 68 L. ed. 388, 33 A. L. R.

472. Whether regulation is reasonable always depends on circumstances. * * * But where the field is limited, as reasonable rates will afford fair returns to but one, and two seek to occupy it, the law of self-preservation and survival of the fittest invokes the right of competition to the last extreme; and any minimum rate and order which would prevent the struggle and condemn the rivals to the ordeal of slow starvation is unreasonable and void. In such circumstances the state must prevent competition for patronage and not deny competition in rates. When the state launches two upon the sea of competition, and the plank of patronage will support but one, it can not in reason deny them the right of necessity to fight to a finish for financial life, even as may two castaways at sea battle to the death for the spar which will support but one, without any wrong to the survivor attaching. The remedy is in the state's hands, by restricting, as many states do, the number of utilities to the need of the field. * * * That in circumstances here the minimum rate benefits nothing is so clear that nothing contrary has been suggested or can be conceived. And this statute, like all since the classic which imposed death on any who shed blood in the streets of Verona, is presumed to intend exception to avoid absurd and unjust consequences. The statute valid, but not the order, plaintiff is entitled to injunction in respect to the latter only."

This same principle which seems to be based on a special statutory provision or state policy, protecting public utilities against unfair competition and conserving service against the ravages of rate wars, is established and discussed as follows in the case of *Mapleton, Inc. v. Iowa Public Service Co.*, 209 Iowa 400, 223 N. W. 476, P. U. R. 1929B, 359: "The incorporated town of Mapleton owns and operates a municipal plant in its proprietary capacity. The result is that this plaintiff in its governmental capacity has within it two public utilities. The question is, may they compete in rates? If so, to what extent? * * * When the owner of private property devotes it to the public use, as herein, he voluntarily retires from the field of competition, so far as the question of rates is concerned. It is the public, as a patron, who is interested in free competition. A municipality is the representative of the public pro tanto. When it exercises the power of fixing rates, it waives competition and establishes a quasi-monopoly. * * * Though the town in its governmental capacity could be deemed as partial to its own child, yet it can extend no discriminating favors thereto. It can impose no rates which are not applicable to both plants. The municipal

plant can threaten the defendant with no competition in rates.
* * * If this can be lawfully done, then a municipally owned plant must always be at the mercy of the owner of a privately owned plant, when such owner chooses to inaugurate a rate war and to take a loss therefrom. The exercise or existence of such a power is antagonistic to the whole scheme of public service by utility companies, and is inconsistent with the principle of rate regulation. It seems plain enough that the municipal plant must charge the ordinance rate. Why should the statutory mandate speak otherwise to the defendant? Under the literal terms of the statute (section 6143), the rates are fixed for both plants, and each of them is bound to conform thereto. In order to sustain the defendant's position, it would be necessary to add qualification to the terms of the statute to the effect that the rate fixed is a maximum one only. There can be no legitimate construction of the statute to that effect, unless it be necessary to save its constitutionality. Such necessity is not present. * * * The advantage of a monopoly is its economy. Though there be a splitting of this benefit where the business is divided between two franchise holders, the evil of monopoly in unregulated enterprises is wholly avoided by statutory regulation. Though it be true that the town in its governmental capacity has a necessary interest in its own plant, and might therefore be deemed disposed to discriminate against the defendant, in the exercise of its governmental functions, yet it has not done so. The ordinance is applicable alike to both franchise holders. * * * The plaintiff, having exercised its statutory power to fix the rates, owes a corresponding duty to each franchise holder to enforce such rates uniformly and impartially against both. In doing so it is performing its plain public duty. Nor has it any discretion to qualify the requirement of obedience, which the statute makes upon the franchise holders."

This same rule seems to obtain in Oklahoma where the court spoke of a rate fixed by the commission as "minimum" as provided for by the constitution and statutes of the state. This principle is discussed as follows in the case of Shaffer Oil & Refining Co. v. Creek County Gas Co., 114 Okla. 258, 246 Pac. 630, P. U. R. 1926E, 289, where the court said: "It is therefore not controverted that, at the time of the service rendered by the utility, there were specific rates fixed by the commission, not as set out in complainant's brief as 'maximum,' but as 'minimum.' So, if it is commission rates that complainant contends for in specific figures, they are to be found in orders of the commission

covering the entire period of time here in question. There is nothing in the record which would have warranted the commission in fixing smaller rates than those above specified as appearing in the said orders. If it is for a reasonable rate in disregard of the specific rates fixed by the commission that complainant contends for, there is nothing produced by the complainant which would even indicate what such reasonable rates as an independent matter of fact would be, even on the rule of law contended for by it, to wit, that rates must be based upon the investment and the expense of operating the utility. * * * If the question that the utility is required by the common-law rule to furnish the same service to its customers similarly situated, at the same rate, were the only one involved in this controversy, it could be settled with clarity and ease by the authorities cited by the appellant. * * * But we do not deem it imperative to point out at further length that these industries, by reason of the voluntary acts of the parties were not in such a similar situation, and furnished such a similar service that, even if the rule *supra* was controlling, it would be reasonable and just to reverse the commission. As stated above, the common-law rule is subject to alteration by statute. The constitution and statutes of this state have placed the regulation of such utilities in the corporation commission. Their orders are as legislative and effective as legislative enactments. * * * The power to regulate the rates of such utilities is one inherent in the sovereign, and every contract made as to rates by or with a corporation authorized to contract in reference thereto is made with the knowledge that the sovereign power of the state can alter the same at its will. In this state the agency of the sovereign to do so is the corporation commission."

While the courts presume that rates and regulations fixed by the commission are reasonable and just, where the evidence is clearly to the contrary and the action of the commission is arbitrary and unreasonable, the courts will not hesitate to set it aside for that reason. An interesting discussion and application of this principle is furnished in the case of *Ashland Water Co. v. Railroad Comm. of Wisconsin*, 7 Fed. (2d) 924, P. U. R. 1926B, 293, as follows: "But, dealing with the record as * * * analyzed, we believe these propositions, among others, are before us: (1) That the action of the commission in selecting a method of developing cost reproduction figures during a ten-year period which ended eight years before the date of hearing is arbitrary. (2) That the action of the commission in taking only such of the

property as was in service at the end of the period so ending was arbitrary. (3) That the action of the commission in adding to the results of its calculations as to part of the property on a ten-year price level cost reproduction basis, as above, the accretions thereto at actual investment during the eight ensuing years, without regard to reproduction cost value of the latter at the date of the hearing, is arbitrary. (4) That when the commission, pursuing (1), (2), and (3), last supra, found depreciated value, \$450,612, and then proceeded to take figures, 'new \$529,000,' thus ignoring the elementary necessity of taking account of depreciation in valuations, it acted arbitrarily. (5) That when the commission, having pursued the course indicated in (1), (2), (3), and (4), supra, added fifteen per cent, it acted arbitrarily—especially as the result was left lower than the amount indicated by pursuing any other hypothesis or method which dealt with evidence showing reproduction costs at the time of hearing. (6) That in accepting Basis A the commission acted arbitrarily, because it took no note of going concern value. (7) The commission's rule, hereinafter discussed, respecting the consideration of reproduction cost evidence, is arbitrary, and compels—in the light of its concurrence in the 'prudent investment theory'—a disparagement of that sort of evidence and its probative quality. * * * These excerpts, by the commission's reference to its opinion in the Duluth matter, exhibit its unreserved acceptance of the so called 'prudent investment' theory of valuation. I say unreserved, because the commission says so; it says that the presence and consideration of reproduction cost evidence in valuing utilities is without justification. Whatever it says about evidence of 'reproduction costs at current prices,' it takes care to formulate an express rule requiring it in law to disparage such evidence, to 'assign it to a position of lesser importance,' when cast over against 'prudent investment' showing—the latter to be given 'very great weight.' And, as it will be attempted to demonstrate, when the commission adopted that as its dominant and binding guide, the methods pursued and the results attained defied the rule binding it, and us, no matter whether, under that rule, reproduction cost evidence as of the time of inquiry requires, dominant, controlling, substantial, due or only reasonable, or fair, consideration. * * * Plainly, the suggestion of thus overthrowing the commission's finding of a seven per cent rate is put forward as a remedy for its error with respect to the base, and, if indulged, a mere paradox is erected, whereby the court would add its own arbitrary

and capricious action in one respect to that of the commission in the other. There is this fundamental aspect of these last two suggestions: Each by conclusive implication assumes that, unless the suggestions are tenable, then upon this record the commission has erred. Neither suggestion is relevant to the rules governing the consideration of reproduction cost evidence. But each is put forward as a means (1) of entirely superseding the rule; or (2) declaring its violation—but with no change of result. If courts may thus deal with contentions of parties claiming to be aggrieved, it might be well at once to accord to commissions not only plenary, but final, power. No matter how grievous the errors and results in Basis A, the remedy is found in reducing seven per cent to six per cent and thereby, by indirectation, raising \$620,000 to \$750,000, in that manner to bring about a reflection of due and fair consideration of reproduction costs. Or, if the plaintiff insist upon \$800,000 as a fair rate base, then adjudge approximately five or five and one-half per cent as a fair rate of return! * * * The effect of all of these cases is that courts and commissions can not first disparage evidence to the extent, perhaps, of ninety per cent, and then insist that a finding, because it may equivocally or conjecturally show the other ten or fifteen per cent, reflects, not disparaged, but fair and adequate, consideration of the whole evidence. The plaintiff, in our judgment, has made out a plain case, and is entitled to an injunction.”

§ 555. Question of reasonableness raised by either party.—The presumption in favor of the rate, when fixed by the state or its duly authorized agency, the municipality, being a reasonable one, is not only binding on the company furnishing the service but also on the customer who is accordingly liable to pay for the service furnished him at a rate not in excess of the one so fixed. No matter how unreasonably high such rates may be, the case of *Brooklyn Union Gas Co. v. New York*, 188 N. Y. 334, 81 N. E. 141, 15 L. R. A. (N. S.) 763, 117 Am. St. 868, decided in 1907, held that no constitutional right of the customer was thereby invaded because he was under no obligation to purchase the service, and that he must seek his relief in case the rate is excessive at the hands of the legislature and not through the courts, for as the court said: “Whatever price the legislature permitted the plaintiff to charge must be deemed to be reasonable and hence a charge of any sum below the maximum of one dollar and twenty-five cents must be deemed and taken to be a reasonable charge. When the price of a commodity is established by law, it is not competent for the party purchasing it to resist payment on the

ground that the law has permitted the seller to make an unreasonable charge. Hence, when the plaintiff furnished and the defendant received and used the gas, the latter was precluded by statute from raising any controversy such as this with respect to the reasonableness of the charge. In other words, the charge must, in view of the statute be deemed reasonable."

The case of *Griffin v. Goldsboro Water Co.*, 122 N. Car. 206, 30 S. E. 319, 41 L. R. A. 240, decided in 1898, however, disagreed with this principle with some degree of reason, for if the municipal public utility has the right to attack a rate on the theory that it is inadequate it is argued relief should be equally available to the customer against excessive rates, and in the absence of a contract by competent parties fixing rates there is no reason why an excessive as well as an inadequate rate should not be set aside. The reason given for the decision in this case is not entirely satisfactory, however, because it held that the municipal public utility was bound by the rate as fixed and at the same time permitted the customer to have it set aside as excessive. In the course of its opinion the court said: "While the defendant can not charge more than the rates stipulated in the ordinance granting it the franchise, because granted upon that condition, those rates are not binding upon consumers who have a right to the protection of the courts against unreasonable charges. * * * Singularly enough, it appears incidentally in the evidence furnished by the defendant that, in the towns in North Carolina which do not own their waterworks, the maximum rates charged consumers are from fifty to three hundred per cent more than the maximum rates charged consumers in Wilson, Winston, and Asheville, the only towns which own their waterworks."

The difference between these two cases seems to be one of form or procedure, however, rather than of law, for both recognize the right of the customer to raise the question, although the former one insists that the customer's relief must come through the legislature, which alone has the power to fix the rate, and not through the courts which can only determine its reasonableness.

While either party may raise the question of reasonableness the public service commission may also do so in its discretion, as was decided in the case of *State v. Public Service Comm.*, 76 Wash. 492, 136 Pac. 850, where the court said: "These provisions, we think, lead to the conclusion that the question of the commission entering upon an inquiry upon its own motion, or of the commission of its own motion pursuing an inquiry beyond

the evidence brought before it by the complaining and defining parties, where the inquiry is instituted at the instance of such complaining party, is one of discretion in the commission, quite beyond the control of the courts. * * * It seems to us to require but little argument to show that, while the Public Service Commission Law authorizes the commission to institute and pursue an inquiry upon its own motion touching the reasonableness of rates of a public service corporation, the commission is the sole judge of when it will so institute and to what extent it will so pursue an inquiry. In determining this question, the commission is not acting in any sense judicially, though it may be said to so act in weighing the evidence and reaching its final decision upon an inquiry. This apparently dual nature of its duties was noticed by us in *State ex rel. G. N. R. Co. v. Railway Commission*, 60 Wash. 218, 223, 110 Pac. 1075. Manifestly it is wholly impractical and beyond the proper sphere of the courts to assume to control in any degree this purely nonjudicial duty of the commission."

While the commission may modify rates which are not reasonable it can only do so after a finding of facts justifying such action, for as the court in the case of *Commonwealth v. Shenandoah River, Light &c. Corp.*, 135 Va. 47, 115 S. E. 695, P. U. R. 1923C, 593, said: "In this case, without evidence or investigation, the commission adjudged the contract rate to be illegal and the new increased rate to be legal. * * * A fair construction of the statutes referred to indicates that contract rates may not be changed by the state until and except there first be an investigation and a finding of the facts from which it can be adjudged that such rates must and should be modified, suspended, or abrogated for the reasons stated in the statute, and in the public interest."

While the question of the reasonableness of a rate may be raised by either party, the public utility has the right to depend upon the rate fixed and charge the consumers accordingly, for as the court said in the case of *Oklahoma Gas & Electric Co. v. Grain Exchange Bldg. Co.*, 131 Okla. 205, 268 Pac. 248, P. U. R. 1928D, 574: "Upon such consideration it appears to us that the logical effect of the evidence established on the one hand that the complainant, having been put upon the exercise of its diligence, failed to make inquiry in time to obviate the ill effects of a delayed vigilance. It had notice of the existence of the two contracts and that electric service was being rendered in accordance with the terms thereof which were not in contravention of the

rates fixed by law. Upon notice to the respondent, it was given the benefit of the sliding scale rate. * * * Its contractual relationship with complainant was based on written contracts which were explicit in their terms, and that its service to complainant was rendered conformably thereto. A public utility engaged in the sale of electricity at rates fixed by the corporation commission, schedule of which is on file with the commission and open to public inspection, has the right to act affirmatively upon its contracts made with consumers within the limitations fixed by law, and rely thereon, in the absence of actual notice otherwise as being the manner in which its service is to be rendered to the consumer at the particular premises designated in the contract."

The question of the reasonableness of the rate may be raised by either party including a municipality whose employees use the service at its expense. A municipality, as well as other interested parties, must first contest the proposed rate before the public service commission and may then resort to the courts for relief. Where it appears that the increased rate will provide the necessary capital for a unified and improved service, the courts will favor the necessary increase in order to secure the proper service, for as the court said in the case of *Wichita v. Hussey*, 126 Kans. 677, 271 Pac. 403, P. U. R. 1929A, 297: "The trial court held that the city of Wichita did have a right to maintain the action. Its petition did not allege any specific interest in the bus rates, but in the evidence it casually developed that some of its employees used the buses at its expense. But the Public Utilities Act gives 'any body politic or municipal organization' a right to complain to the public service commission about utility rates, and to be heard before that tribunal when such rates are under consideration, and also to invoke a judicial review of the orders of the commission concerning them. * * * A city has no inherent right to provoke litigation over public utility rates until such relief as the Public Utilities Act can furnish has first been invoked. *City of Parson v. Water Supply & Power Co.*, 104 Kans. 294, Syl. par. 3, 178 Pac. 438; *Kansas Gas & Electric Co. v. Public Service Com.*, 122 Kans. 462, 251 Pac. 1097; *City of Hutchinson v. Hutchinson Gas Co.*, 125 Kans. 346, 350, 358, 264 Pac. 68. But here the city took the proper course throughout; it contested the proposed rate advances before the public service commission; and, being dissatisfied with the order of that tribunal, it brought an action thereon as authorized by R. S., 66-118. This court holds that the city of Wichita was a proper party to parti-

cipate in this rate regulating proceeding before the public service commission, and a proper party to bring a timely action invoking a judicial review of the orders of the commission pertaining thereto. Turning, then, to the narrow limits of the present appeal, our difficulty is to discover anything that savors of error or irregularity in the judgment of the trial court. * * * And it was in the belief that if higher rates were granted, and the business lines unified and systematized, and sufficient new capital invested, an efficient up-to-date system of omnibus transportation could be installed, to articulate with the street railway system, which would give the town the sort of service it should have. The trial court found that the rates authorized by the commission were experimental. There were incontrovertible facts to support that finding. The trial court found that the financial results of three months' experimenting with the newly authorized rates were insufficient to furnish a fair standard by which to measure future receipts of the bus lines. It is not possible to overthrow that conclusion."

§ 556. Discretion of parties fixing rates respected unless abused.—The fixing of rates by the state or its duly authorized agent necessarily involves the exercise of discretion on the part of the authorities, and unless there is an abuse of this discretion so that the rate fixed is clearly unreasonable, the courts will refuse to set it aside as such, for as the court, in the case of *Twitchell v. Spokane*, 55 Wash. 86, 104 Pac. 150, 24 L. R. A. (N. S.) 290, 133 Am. St. 1021, decided in 1909, said: "Some reasonable discretion must abide in the officers whose duty it is to fix such rates, and, unless the courts can say from all the circumstances that the rate fixed is an excessive one and disproportionate to the service rendered, the judgment of the officers fixing the rate must stand. The rate charged by the city seems reasonable for the service rendered."

The rate fixed will be presumed to be reasonable and the burden is on the petitioner to disprove the fact, for as the court said in the case of *Bell v. Kaye*, 127 Miss. 165, 89 So. 910: "The municipality has the right under statute to regulate the charges to be collected, but they must allow reasonable compensation to the owner of the water and electric power plant for his services rendered. In the absence of a valid ordinance fixing the rates the appellee had a right to recover reasonable rates. In the case before us the appellants must stand either upon the ordinance or upon a reasonable rate, and, while they attack the ordinance as being void, they do not allege what is a reasonable rate, nor do

they allege that the charges fixed constitute an unreasonable rate."

A court of equity will not relieve parties from contract obligations properly assumed and binding on them, although burdensome, for as the court said in *Lenawee County Gas &c. Co. v. Adrian*, 209 Mich. 52, 176 N. W. 590, 10 A. L. R. 1328, P. U. R. 1920D, 1036: "If the result of their accepted relations was in the first instance a valid binding agreement, which the contracting parties were competent to make, the fact that it proved to be an unprofitable or losing contract to one of the parties could not render its enforcement by the other unconstitutional; neither does equity relieve from hard bargains simply because they are hard, even though made so by the World War."

§ 557. **Municipal public utility in fixing rates must be reasonable.**—Where rates have not been fixed by the state or any authority acting for it, the municipal public utility having the right to furnish the service by virtue of that fact has the right to fix the charge for its service, although of course the reasonableness of the charge when fixed is a question for the courts to determine, and where they are excessive they will be set aside by the courts the same as where the state authority fails to fix the proper rate. As the court, in the case of *Wilson v. Tallahassee Waterworks Co.*, 47 Fla. 351, 36 So. 63, decided in 1904, said: "Not being included within those cases for which rates are prescribed, the company may fix rates,⁷ and the fixing of a minimum charge for service to small consumers in excess of the ordinary price of the quantity of water consumed by them is not in itself unreasonable."⁸

Unless the rates fixed by contract are reasonable and the city had the power thus to fix rates they will be changed if found to be confiscatory, as the court decided in the case of *Southern Iowa Electric Co. v. Chariton*, Iowa, 255 U. S. 539, 65 L. ed. 764, 41 Sup. Ct. 400, P. U. R. 1921D, 275: "Two propositions are indisputable; (a) that although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations; * * * and (b) that where, however, the public service corporations and the governmental agencies deal-

⁷ *Carney v. Chillicothe Water & Light Co.*, 76 Mo. App. 532. 34 Mo. App. 501; *Louisville Gas Co. v. Delaney*, 100 Ky. 405, 38 S. W.

⁸ *State v. Sedalia Gas Light Co.*, 703, 36 L. R. A. 125.

ing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract and therefore the question of whether such rates are confiscatory becomes immaterial. * * *

It follows that, as the rates here involved are conceded to be confiscatory, they can not be enforced unless they are secured by a contract obligation. The existence of a binding contract as to the rates upon which the lower court based its conclusion is, therefore, the single issue upon which the controversy depends.

* * * The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law."

Reasonableness of rates fixed by the city is presumed and while the court may find to the contrary it may not fix other rates, for this is a legislative matter as was held in the case of *State v. Public Service Comm.*, 101 Wash. 601, 172 Pac. 890, P. U. R. 1918E, 277: "Here is a clear and specific grant by the state to the city to impose terms and conditions upon which any of its streets may be used by a street railroad. * * * Had the legislature intended that the commission should have power to deal with franchises in cities or abrogate provisions of franchises which had previously been amended by the cities, there certainly would have been embodied in the law as passed some provision relating to the subject-matter. * * * If, as found by the commission, the revenue of the petitioner based upon a five-cent fare is not sufficient to provide an adequate and sufficient service, and at the same time afford a reasonable and proper income to the petitioner, the remedy is with the legislative branch of the government, and not with the court. It is the duty of the court to construe the law as it finds it."

That changed conditions justify a change of rates is clearly decided in the case of *Scranton v. Public Service Comm.*, 268 Pa. 192, 110 Atl. 775, P. U. R. 1920F, 661, as follows: "What may have been a reasonable rate of fare at the time of the passage of a consenting ordinance may, under changed economical conditions, become confiscatory, and a street passenger railway company may not be able to serve the public on account of insufficient revenues, based upon the fare fixed in the ordinance. When such a situation arises, as it has arisen and will arise again, there must be relief somewhere to the public, and it lies in the police power of the state, which is never to be abridged nor bartered away. When the city of Scranton gave its consent to the construction of what is now the Scranton Railway, it exercised a constitutional power conferred upon it, but it is conclusively presumed to have known at the time the consenting ordinance was passed that the sovereign police power of the state to modify its terms would be supreme whenever the general well-being of the public so required."

§ 558. **Cost of service includes measuring it for customer.**⁹—The duty devolves upon the municipal public utility of measuring the service furnished the customer in order to determine the amount due from him, and where the rate to be paid for the service is fixed and defined, the expense of measuring the service furnished can not be charged to the customer in the form of meter rentals or as a fixed minimum charge per month, for, as the court, said in the case of *Montgomery Light & P. Co. v. Watts*, 165 Ala. 370, 51 So. 725, 26 L. R. A. (N. S.) 1109, 138 Am. St. 71, decided in 1910: "The agreement of the company is to furnish gas at so much per cubic foot, and that must necessarily mean that all the means and instrumentalities necessary to furnish it at those rates shall be provided by the company. It may adopt any means, suitable and accurate, for ascertaining the number of feet consumed, and the customer can not direct or provide what means shall be used; his only concern being that he receives the service, and is not charged more than the rate fixed by law or the contract."

As the duty of fixing the rate as well as determining the amount of the service at its own expense, devolves upon the municipal public utility, where the rate has not been fixed by the state, the court will compel the furnishing of such service at the rate fixed, for as the court said in the case of *Bothwell v. Con-*

⁹ This section (§ 452 of 2d edition) cited in *Iowa R. & Light Co. v. Jones Auto Co.*, 182 Iowa 982, 164 N. W. 780.

sumer's Co., 13 Idaho 568, 92 Pac. 533, 24 L. R. A. (N. S.) 485, decided in 1907: "We have failed, however, to find a single case where a company had fixed its own rates, and the individual had offered to pay such rates, that a court has refused to allow him to pay that rate or refused to compel the company to supply him with water upon the tender of such rate. * * * The duty of action in the matter of establishing rates rests on the company, and not primarily on the consumer, and the company will not be allowed to plead its own negligence and laches to justify and excuse its refusal to furnish water to one residing within the franchise limit."

The duty of furnishing service at reasonable rates, including that of fixing the rates where the state or its agent has not done so, devolves upon the municipal public utility by implication from its acceptance of the franchise to furnish service, as does also its undertaking to exact only a reasonable charge for the service rendered, for as the court, in the case of *Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 116 Am. St. 944, 9 Ann. Cas. 819, decided in 1906, said: "The business of supplying gas and electricity to meet the demands of the inhabitants of a community, under grant of the state or of a municipal corporation, is of a public nature. It is in character a public business, and, like that of common carriers, warehousemen, and other enterprises, in which the community has an interest different from what it has in private enterprises. * * * The right to conduct such a business under grant from a municipality in no way affects its character, and such a grant is deemed to be one from the state through one of its municipal agencies. One of the conditions for the exercise of the privilege of conducting a gas business, under legislative grant, is that, in the absence of legislative prescription restricting the rate of compensation for the service furnished, the grant carries by implication the obligation to furnish it at a reasonable price."

That the cost to the public must be reasonable and considered as an entirety is well stated in the case of *Eau Claire v. Wisconsin-Minnesota Light & Power Co.*, 178 Wis. 207, 189 N. W. 476: "Under existing statutes the commission is required to treat the municipality as a unit and to base its rate upon the cost to the utility of serving the individual municipality rather than the average cost of serving many distinct and scattered municipalities. Because the commission, in fixing the rates under review, treated the Loop System, rather than the individual municipality, as a unit, it proceeded upon an erroneous fundamental basis, and its

order must be vacated and set aside. * * * It is a rate which assures the utility a reasonable return upon the money invested. But what is a reasonable rate so far as the public is concerned has not been the subject of frequent judicial treatment."

That the rates should vary with the nature of the service given is clearly indicated in the case of *Nowata County Gas Co. v. State*, 72 Okla. 184, 177 Pac. 618, P. U. R. 1919C, 40: "As we understand the order of the commission, it proceeds upon the theory that, inasmuch as the maximum compensation of the gas company is allowed upon the basis of adequate service, where the service is not kept up to this standard the rate charged the public should be graded in proportion to the falling off in efficiency.

* * * In the case at bar, the corporation commission, it seems to us, have correctly solved the problem by the adoption of, what may be called, the efficiency table hereinbefore set out, and basing the proportion of the maximum rate the company may justly collect from the public upon the quality of the service rendered as well as upon the quantity of the gas furnished. As it is conceded by counsel that this efficiency table and the computation of the commission based thereon is correct, we are not prepared to say, in view of the constitutional presumption to the contrary, that the conclusion reached by the commission in its order is unreasonable or unjust, or that it is unsupported by evidence."

§ 559. Reasonable value of service determines rates.¹⁰—That the public can not be required to pay a rate, however unreasonable, in order that the municipal public utility may be able to realize a reasonable return on its investment, because no return is guarantied to any such investment any more than in the case of a private enterprise, and that the rate must be fixed in the light of the value of the service is stated in the case of *Spring Valley Waterworks v. San Francisco, California*, 192 Fed. 137, decided in 1911, to the effect that: "The public has a right to demand that no more shall be exacted than the services rendered are reasonably worth. The public can not be subjected to unreasonable rates, in order simply that stockholders may earn dividends."¹¹

The case of *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, decided in 1897, in effect enunciates the

¹⁰ This section (§ 453 of 2d edition) cited in *Garfield Consol. Water Co. v. Public Service Comm. of Nevada*, 263 Fed. 979.

¹¹ *Covington & Lexington T. R. Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198; *Spring Valley Water Co. v. San Francisco, California*, 165 Fed. 667.

same principle as to the rule controlling the question of rates by saying: "Then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest."

The reasonable value of the services to the customers is accepted as the proper test of the reasonableness of rates in the case of *Goldfield Consolidated Water Co. v. Public Service Comm. of Nevada*, 236 Fed. 979, P. U. R. 1917A, 685, as follows: "While the company is entitled to a fair return on the reasonable value of its property, the public has a right to demand that no more shall be exacted than the services are reasonably worth under the circumstances. 'The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.' Compensation for the services of a public utility 'must be just to the public, and should be just to the company, but if it can not be just to both, it must in any event be just to the public.' This is clear, because one who has voluntarily devoted his property to the services of the public can not complain that he is the victim of confiscation if he receives all that the service is worth. *Covington & L. T. R. Co. v. Sandford*, 164 U. S. 578, 597, 598, 41 L. ed. 560, 566, 567, 17 Sup. Ct. 198; *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Maine 371, 59 Atl. 537; *Southern P. Co. v. Bartine*, 170 Fed. 725, 767; *Puget Sound Electric R. Co. v. Railroad Commission*, 65 Wash. 75, 117 Pac. 739, 744, Ann. Cas. 1913B, 763; *Whitten, Valuation of Public Service Corp.*, section 1012; *Pond, Public Utilities*, sections 453, 454."

To the same effect in holding the reasonable value to the customer the proper basis for rates, the court, in the case of *Hamilton v. Caribou Water, Light &c. Co.*, 121 Maine 422, 117 Atl. 582, P. U. R. 1922E, 801, said: "The commission having found that the water furnished by the company is unfit for drinking purposes, this court can not say as a matter of law that the rates filed by the company were reasonable and just, and those ordered by the commission are unreasonable and unjust. The latter may be all the service is reasonably worth to the customer. * * * The public is entitled to demand that no more be exacted for the service of a public utility than the services rendered are reasonably worth. *Smyth v. Ames*, 169 U. S. 466, 547, 18 Sup. Ct. 418, 42 L. ed. 819; *Kennebec Water Dist. v. Waterville*, 97 Maine 185, 202, 54 Atl. 6, 60 L. R. A. 856. The reasonableness of rates relates both to the company and to the customer. 'Rates must be reasonable to both, and if they can not be to both, they must be

to the customer.' *Water Dist. v. Maine Water Co.*, 99 Maine 371, 380, 59 Atl. 537, 540. It would be quite as objectionable to take from the consumer more than the service was reasonably worth, as it would to deprive the company of a fair return upon a fair value of its property. If the rates established represent the maximum reasonable value of the service to the consumer, it can not be said that they are confiscatory as to the company, whatever may be the result upon its returns."

The value of the service to the user is an important element in fixing a reasonable rate, especially in cases where the service is insufficient or unsatisfactory, although of course the cost of the service and the amount of the investment necessary to furnish it is always an element which must be considered in determining the proper rate. This principle and the reasoning on which it is established are furnished in the case of *Quarles v. Appleton*, 45 Fed. (2d) 675, where the court said: "In other words, is not the worth of the services to the user a factor which must be considered in appraising the value of the services? We think it is.

* * * The property of the utility was finally turned over to appellee and the price fixed by the Wisconsin commission was paid therefor. * * * We also conclude that if the value of the services rendered by the utility is to be measured by its worth for fire protection to the users, the utility was adequately compensated by the city for the services rendered. At least, the evidence is such that we can not disturb the court's finding as to this issue unless we adopt appellant's theory of compensation.

* * * To say broadly that the value of the utility service to the consumer is immaterial is erroneous. There may be support for such a statement if it were limited to utilities which were fully meeting their obligations. For instance, a street car company may haul a passenger many miles for seven cents. The reasonableness of the charge is ordinarily in no way dependent upon the value of the service to the passenger. A somewhat similar situation may be imagined in the case of a telephone service. But the test of the soundness of the rule, as applied to the instant case, comes when we inject the factor of a partial failure of service. In other words, the reasonable charge for the use of the telephone may be ordinarily determined by factors which entirely overlook the value of the service to the user. But if it be shown that there is a partial or complete failure of service and such failure is the regular and usual practice of the utility, a different situation is presented. In the instant case, the city was interested in fire protection. Protection against fire

was obtainable only through a constant and sufficient water pressure. A water pressure such as the record shows was at times furnished by the utility in the instant case, was no protection against possible loss through fire. It is not difficult to conceive of an extreme case. The waterworks plant might be complete in all respects save its pumping facilities which did not represent more than ten per cent of the cost of the total plant. Without engines and pumps the utility could not supply water. Could it be argued that the value of the service was nine-tenths what it would have been if the engines and pumps had been supplied? Hardly. * * * We conclude that the worth of the service to the consumers is a relevant factor to be considered along with others in determining the reasonable value of the services rendered by the waterworks company to appellee. This being so, it follows that there was evidence to support the finding of the court in favor of appellee. In other words, there was evidence in the record which sustained the appellee's contention that the reasonable value of the services rendered by the waterworks company did not exceed the sums paid by appellee for such services."

§ 560. Risk of investment assumed by owner.¹²—That the municipal public utility necessarily assumes the risk of the investment which it makes and is not guarantied a fixed return upon it and can not require its customers to pay for the service furnished at a rate which will assure the success of the investment where the service provided far exceeds the demand for it, is well stated and illustrated in the case of Brunswick & T. Water Dist. v. Maine Water Co., 99 Maine 371, 59 Atl. 537, decided in 1904, where the court said: "A public service property may or may not have a value independent of the amount of rates which for the time being may be reasonably charged. A public service company may, under some circumstances, be required to perform its service at rates prohibitive of a fair return to its stockholders, considering their property as an investment merely.¹³ It is true that the fair value of the property used is the basis of calculation as to reasonableness of rates, but, as was pointed out in the Waterville case, 97 Maine 185, 54 Atl. 6, 60 L. R. A. 856, this is not the only element of calculation. There are others; as, for instance, the risks of the incipient enterprise

¹² This section (§ 454 of 2d edition) cited in Garfield Consol. Water Co. v. Public Service Comm. of Nevada, 263 Fed. 979.

¹³ Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418.

on the one hand, and whether all the property used is reasonably necessary to the service, and whether as a structure it is unreasonably expensive, on the other. For a simple illustration, suppose that a 500 horsepower engine was used for pumping when a 100 horsepower engine would do as well. As property to be fairly valued, the large engine might be more valuable than the smaller one, yet it could not be said that it would be reasonable to compel the public to pay rates based upon the value of the unnecessarily expensive engine. * * * Rates must be reasonable to both, and, if they can not be to both, they must be to the customer. * * * We understand the purport of this request to be that a public service company can not lawfully charge, in any event, more than the services are reasonably worth to the public as individuals, even if the charge so limited would fail to produce a fair return to the company upon the value of its property or investment. Such, we think, is the law. * * * The company engages in a voluntary enterprise. It is not compelled, at the outset, to enter into the undertaking. It must enter, if at all, subject to the contingencies of the business, and subject to the rule that its rates must not exceed the value of the services rendered to its customers. * * * In the aspect now being considered, the worth of a water service to its customers does not mean what it would cost some one individual, or some few individuals, to supply themselves, for one may be blessed with a spring, and another may have a good well. It means the worth to the individuals in a community taken as a whole."

After an excellent summary of the items to be considered in fixing the rate and determining whether it is a proper one, the court, in the case of *Home Tel. Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547, 48 L. R. A. (N. S.) 1055, Ann. Cas. 1912D, 301, decided in 1911, added: "And in passing upon the question, the fact should not be overlooked that no return whatever is guaranteed to the owner of the public utility. Upon that score it occupies no better ground than the owner of capital invested in a private enterprise. It follows that unless the maximum rate be placed at such a figure as is above the average rate of return upon reasonably safe investments in private ventures, capital will naturally turn to channels in which no maximum limit as to the return exists."

The fact that a public utility fixed its own rate too low to be profitable and that natural gas came in competition with its artificial gas plant with the effect of further reducing its profits does not change the well-established rule that in the valuation of pub-

lic utility property, present values and costs of operation must be considered, and a rate fixed which will pay operating expenses, take care of depreciation, and provide a reasonable return upon the investment. This principle is established as follows in the case of *State v. Busby* (Mo.), 274 S. W. 1067, P. U. R. 1926A, 803, where the court said: "A plant thus in successful operation would certainly have a value in excess of such cost on the market; and, even if such a plant were not successful, solely because of unreasonably low rates being imposed upon it by a rate-making body, a value above that of the physical property should, notwithstanding, be allowed to it in a rate-making case. However, we are valuing the property of a company whose rates were voluntarily made and put into effect by the company itself, without restriction or regulation in that regard by the state or municipality, and whose business, according to its own showing, has been unprofitable each year for a period of almost ten years. It is needless to say that such a property is not a desirable investment and does not have a market value above the cost of the physical property. That this condition is not due to mismanagement of the plant, but rather to the fact that natural gas was unexpectedly brought to the city of St. Joseph, does not alter the situation. The fact remains that we find the property under voluntary rates unprofitable and without any value above that of the physical property, and, in our opinion, the commission would not be authorized in a rate-making case to add a value as a going concern that does not in fact exist. * * *

By the two foregoing decisions, the United States Supreme Court has firmly established the rule that, in fixing the value of the property of a public utility, costs prevailing at the time such valuation is made must be considered by the commission. * * *

When it appears that the high prices of labor, materials, and supplies prevailing in 1920 were not reflected in the value fixed by the commission upon practically the whole of the company's property, and that no going value was taken into consideration, the reasonableness of the rates and charges fixed by the commission, under the conditions under which they were fixed, becomes too clear for controversy. * * *

The rates charged must be sufficient to pay operating expense, depreciation on the plant, and a reasonable return upon the investment in the plant. * * *

It can not be said that the commission was without evidence to support its finding authorizing such service charge. * * *

Respondent (relator below) has not shown by clear and satisfactory evidence that the order made by the commission

is either unreasonable or unlawful, as required by section 10535, R. S. 1919. The order of the commission should have been affirmed by the trial court."

As the public utility assumes the risk of its investment and is not guarantied any fixed return, which may be necessary to carry it because the service provided is far in excess of the demand for it, the court will sustain the validity of a municipal ordinance reducing an excessive rate on the theory that the investment in the plant was unwise and unnecessarily large, as is clearly indicated in the case of *Graff v. Seward*, Alaska, 20 Fed. (2d) 816, where the court said: "Upon the evidence the court below found that the rates fixed by the ordinance were not confiscatory. That finding is, upon settled principles, binding upon this court, unless it is clearly shown to be based upon obvious error of law or upon a serious mistake or misconception of fact. We find in the record here no such ground for disturbing the finding. There was evidence tending to show that the public service by the appellant had been inadequate and unsatisfactory, and that the rates he charged were excessive. * * * In brief, the trial court was of the opinion that the appellant's expenditures for buildings and fixtures unnecessary for the public service and his unwise investment in the new intake would amount to the sum of \$50,000, and that a more careful consideration of the natural obstacles to be contended with and the probable future of the town would have entailed an investment of not more than one-half of the amount which he had put into his business. It does not appear that in disposing of the case the court below failed to observe the principles declared in *McCardle v. Indianapolis Co.*, 272 U. S. 400, 47 Sup. Ct. 144, 71 L. ed. 316, and it is to be noted that in the judgment entry the bill was dismissed without prejudice to another suit after one year of operation under the ordinance."

§ 561. **New inventions and improved processes.**—While the owner must assume the risk of the original investment, the installation of a new process made possible by mechanical inventions or patents, which reduces the cost of production, is for the benefit of the consumer as well as the company, which is entitled to receive a reasonable return on the cost of such improvements. Otherwise the company would be the loser because of such improvements and the public benefit would go unrewarded and unpaid for, as the court said in the leading case of *Pacific Gas & Electric Co. v. San Francisco*, California, 265 U. S. 403, 68 L. ed. 1075, 44 Sup. Ct. 537, P. U. R. 1924D, 817: "Obviously, under

the theory accepted below, appellant worsened its situation for rate-making purposes when it reduced the cost of manufacturing gas. Introduction of successful patented inventions enabled the public authorities to lower the rate base and gather all the benefits. The operating plant, made capable of producing gas at smaller cost, was declared less valuable than before. The result indicates error somewhere, either in theory or application of principle. Obsolescence of one or more stations, and perhaps other property theretofore of great value (possibly \$800,000) followed installation of the patents, but the remaining plant plus the patents gave better results. As an operating unit the new combination had greater value than the old; but the court below disregarded the demonstrated worth of the element which wrought this change. The obsolescence in question did not result from ordinary use and wear. Certainly it could not have been long anticipated,—the patents were of recent conception; to provide for it out of previous revenues was not imperative, if possible. Former consumers were not beneficiaries; only subsequent ones could be advantaged. Our concern is with confiscation. Rate making is no function of the courts; their duty is to inquire concerning results and uphold the guaranties which inhibit the taking of private property for public use without just compensation under any guise. We may not, therefore, relegate appellant's claim for past services to the future consideration of the state commission, as the master suggests. After adopting the reduced costs of manufacture for estimating net returns, the court gave no proper valuation to the inventions which caused the reduction, and thereby permitted property to be taken without just compensation. The amount of money actually paid to the inventors was not the proper measure of worth. Experience had demonstrated a much higher one; and to obtain the benefit of their use appellant sacrificed much. Installation of the inventions necessitated new outlay of money and abandonment of property theretofore valuable,—both were necessary in order that the cost of manufacture might be reduced. If appellant's permissible profits depend upon the lowered costs, and it is denied adequate return upon property which made the reduction possible, or recompense for the obsolescence, successful efforts to improve the service will prove extremely disadvantageous to it."

Where it appears that new appliances provide greater safety and convenience and that they have met with general approval, the court will sustain an order of the commission requiring their installation, although the first cost of doing so may be substan-

tial, for as the court said in the case of *State v. Public Service Comm.*, 310 Mo. 313, 275 S. W. 940: "We have always held that this class of cases is tried as cases in equity, and, like equity cases, we will presume the findings of the commission and circuit court are correct, yet they are not binding upon this court where we think the evidence does not support their findings, or where their findings are against the great weight of the evidence. In such cases we have always held we will review the evidence and make our findings as we do in all equity cases. * * *

We are therefore of the opinion that the commission has in this case the power to regulate and control the rules of the appellant, so far as they affect the health, comfort, safety, and convenience and reasonableness of the charge made by it for the services performed for the public. * * *

The complainants' opposition to the rules proposed is one solely of economy. Its counsel insists that the old switch boxes cost not to exceed one-third the cost of the new boxes, that they are practically as good, safe, and convenient as the new boxes. The finding and report of the commission was substantially with the complainants upon this insistence, and counsel for appellant do not seem to controvert it, in so far as the cost of the two boxes is concerned, but the appellant contends that the new boxes proposed to be installed are much safer, more convenient and economical when once installed, and much more beneficial to the city and her inhabitants in the protection of life and property from fire—even the destruction of the city from the same cause. With this idea in view, it seems that three hundred public officers and public commissioners throughout this country have approved just such rules as are involved in this case, and it is worthy of notice that complainants, neither in their petition for the relief asked, nor by the evidence introduced, contradict a single benefit claimed by the company in behalf of their rules, except as to the single question of economy. * * *

If each and every person in the city may be permitted to select and install his or her own kind of a fuse and box, then there would be no uniformity in the scheme and plans to prevent fires and the destruction of property. * * *

It seems to me that no disinterested fair-minded man can read this record and reach any other conclusion than that the new boxes are far more convenient, safer and economical after installed, and reduce the damages to property and life to almost a minimum. There is no question under the evidence in this case but what the safety to property and individuals is far greater than it is to them under the old boxes; also it is for the benefit of the

public, as well as to the parties to this suit and to their employees."

§ 562. Consolidation and elimination of competition.—While the price paid for a competing plant may not be the fair measure of its valuation for fixing rates, the consolidation of two such plants into a single operating system for the purpose of affording an improved service at a reduced rate is commendable, especially where franchise and patent rights are acquired. The elimination of unnecessary investments and operating expenses by a consolidation of competing plants and the reduction in maintenance and operating expenses should redound to the benefit of the public utility and its patrons. Under current methods of regulating rates and service by commissions, there is no longer any occasion for attempting to secure such regulation by competitive conditions, and it is to the best interest of all concerned to eliminate competition of natural monopolies. This principle is generally recognized as being sound, both economically and legally, and it is well expressed by the court in the case of *Huntington v. Public Service Comm.*, 101 W. Va. 378, 133 S. E. 144, P. U. R. 1926D, 835, where the court said: "We can not say, under the circumstances, that the finding of the commission was either against the weight of the evidence or without evidence to support it. Findings of fact by the public service commission will not be reviewed, unless it has acted so arbitrarily and unjustly as to fix rates contrary to the evidence, or without evidence to support them. * * * It may be assumed that the mere transfer of property used in public service at a price in excess of its fair value would not justify an increase in rates. But the purpose of the applicant in acquiring the physical property and franchise rights of the competing company was to afford the public cheaper and better service. With this object in view, there is no suggestion that the price paid was excessive. A utility often pays in the purchase of equipment added cost for patent rights, when less efficient machinery could be secured at lower prices. * * * The effect of the purchase by the applicant of the property and business of the independent utility was to eliminate the unnecessary duplication of investment and expense of maintaining and operating two competing systems, where one will render more adequate service than both. The universal objection to competition of municipal public utility systems is the economic one of the unnecessary duplication of the investment and the expense of maintenance and operation of two parallel systems where one could render adequate service at prac-

tically one-half the cost of installation, maintenance, and even of operation in at least some cases where the cost of the material is only nominal; as, for example, the furnishing of a water supply, where there is practically an unlimited free source of supply available. Nor is this economic objection overcome or even met by the legal theory which until recently prevailed as the sole controlling reason for the supposed advantages arising from competitive conditions as the proper means of regulating the service rendered or the rate charged for it, for it is now very generally recognized that, in case of municipal public utilities which are natural monopolies, competition is at once an expensive and absolutely ineffective ultimate method of regulating either the rates or the service of the modern municipal public utility. The furnishing of telephone service may be distinguished from providing that of any other municipal public utility, and by virtue of this fact it is governed by laws, some of which are peculiar to itself. A customer of a municipal public utility, providing water, gas, light, heat, or power may, as a general rule, be furnished with adequate and complete service by the particular municipal public utility with which he contracts, although there may be a duplication of such service available by the existence of another similar municipal public utility rendering the same kind of service alongside, and parallel with, the competing company with which the particular customer has contracted for his service. In the case of the municipal public utility furnishing telephone service, however, in a field where a competing company is also providing such service, neither company alone and independent of the other can furnish adequate or complete service, unless, which practically never occurs, both companies have identically the same list of customers, except where the competing companies make physical connection of their equipment by the use of a common switchboard, which gives and receives messages from all customers of either company. * * * It is everywhere conceded that a utility with a good business is worth more than one without, and the rule has finally become established that an allowance should, therefore, be made for this intangible, but there is great lack of harmony as to the proper method of ascertaining that value. Having concluded that the telephone company is entitled to earn on its entire investment, and the protesting patrons conceding the propriety of an allowance of at least \$600,000 for going value, it is unnecessary to attempt an analysis of the great mass of conflicting cases relating to the ascertainment of going value. In the expenses of operation is

included an item of expense representing the payment to the American Telephone & Telegraph Company for services and telephone instruments of that company furnished to the applicant company under a contract between them commonly known as the license agreement. According to the terms of this agreement, the parent company is paid by the applicant four and one-half per cent of its gross revenue. * * * The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.*, 125 N. E. 891, 291 Ill. 209, 234 P. U. R. 1920C, 640: "The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers." The court should adhere to that ruling. * * * The utility complains of the rate of return fixed by the commission at seven per cent. * * * In view of the applicant's unique financial and managerial resources, the inaptness of its evidence to establish a greater rate than seven per cent, and the further fact that the stockholders are relieved through the patrons from the payment of income tax on their dividends, it can not be said that the commission has acted arbitrarily in fixing the rate of return."

CHAPTER 23

WHAT CONSTITUTES REASONABLE RATES

Section	Section
565. Reasonable rate question of fact varying with conditions.	576. Fixed charges and maintenance expenses and dividends.
566. Elements to be considered in fixing rates.	577. Obsolescence and physical depreciation as operating expenses.
567. Antagonistic interests of parties and sliding scale of rates.	578. Functional and physical depreciation charged to operation not added to capital account.
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§ 565. Reasonable rate question of fact varying with conditions.—The question of what constitutes a reasonable rate in any case is necessarily determined and controlled by the facts of the particular case, some of which are peculiar to it, and so it is impossible to lay down rules of general application as precedents which will entirely solve the question for all cases. Because of the many items and changing conditions affecting each case, some of which always distinguish it from every other, the solution of the question as to what constitutes reasonable rates is exceedingly difficult, and only general principles, which are fairly and equally applicable to all cases so far as they have facts in common, can be established and employed for the determination of the rate in any particular case.

§ 566. Elements to be considered in fixing rates.—The result reached by the application of the well-established general rule

that the municipal public utility is entitled to a reasonable return on the fair value of its investment is necessarily affected by a consideration of the nature and extent of the element of risk or hazard involved in each particular investment; whether the corporation is secured as a monopoly, which is generally the case under commission control, or whether there is competition presently or prospectively in the field, the expense of operation and maintenance, including functional depreciation or obsolescence, and that due to the ordinary wear and tear of operation, commonly known as physical depreciation. All of these items covering the investment and the cost of maintenance and operation must be given full consideration in determining a rate for the service, which will provide fair earnings and proper returns on the investment. In ascertaining the value of the service to the customer, which is the social and economic point of view, or its cost to the municipal public utility, which is the legal attitude in the solution of the problem, all these questions must be fully and fairly considered, as well as those of the effect of improving the service or reducing the rate or cost of service as a means of increasing the volume of the business and the amount of the net income realized from it, besides the expenditure necessary to establish the business as a going concern with the largest possible number of customers receiving satisfactory service.

§ 567. Antagonistic interests of parties and sliding scale of rates.—The question of what is a fair or proper rate or what constitutes a reasonable return on the fair value of the investment can only be determined after an accurate valuation of the investment has been made and the cost of operation and maintenance, including the various forms of depreciation and any other legitimate items of expense necessary to provide satisfactory service, has been determined with a view of ascertaining what at a given rate would be the net earnings of the company. The interests of the two parties, the producer and the consumer, are naturally always antagonistic, but it may be possible to harmonize them to a degree by an application of the so-called sliding scale of rates which permits the municipal public utility to realize an increasing return on its investment in proportion to the decreasing rate of its service on the condition that the standard of the service remain fixed and the company be required to maintain service up to that standard. To encourage thrift of management or a new process reducing the cost of production, it may be good policy to allow a better return on the investment.

While it is within the province of commissions and courts to protect the public interest and to encourage the cooperative spirit between public utilities and their patrons, they should not interfere with the business management of the company or with the transfer of its stock, beyond the point of preventing any action which would be detrimental to the public interest. Profit rather than public benefit is the natural motive of private investment, and the commission has no authority to interfere with the business management of the company on questions of business policy or stock ownership under its general right of regulation, as is well indicated in the case of *Electric Public Utilities Co. v. West*, 154 Md. 445, 140 Atl. 840, where the court said: "In applying this test in the present case it is important to remember that the commission stands in the place neither of the owner of the properties nor of the legislature, but is a board of public officers whose powers are to be found in the statute and are not to be implied or assumed. * * * In the case of an owner of the stock of such a company is it within the rule of reason to hold that he may not sell his stock to a corporation unless it can be shown that the public will be benefited by the sale? Or may permission be refused merely because the only consideration moving the parties is one of financial investment which the parties believe to be for their mutual advantage? We think not. If public utilities could be owned only by people whose primary purpose is to benefit the public, few of them would be privately owned. Until human nature changes, enlightened self-interest as the moving cause of enterprise is about the best that can be expected. To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of public service commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.' * * * Indeed, rates and securities are expressly eliminated as factors influencing their decision, nor does the commission find that to grant the permission sought would be detrimental to the public interest, and because it does not specifically so find it is most earnestly argued by appellant that its order is unlawful and void. * * * But our difficulty is, the commission did set out a reason for its finding, and in a measure, negatived other reasons; and the reason on which the order appears to be based does not warrant the order."

While the right of regulation is continually in the commission, there is no occasion for frequent revaluations except to correct mistakes and to cover additional investments. Where the company uses its depreciation reserve fund, which belongs to it, by investing it in the business, the company is entitled to a reasonable return. And in the absence of evidence to the contrary, a reasonable fee for services actually rendered by a holding company, which is the actual owner of the property with the right to direct its management and operation, is proper, for the courts are not inclined to interfere with such questions of business management, nor has the commission the power to do so, except as it may regulate the service and fix the rate therefor, especially in the absence of any statutory authority to this effect. After determining the proper valuation and fixing a reasonable rate for the service, questions of business policy and the management of the operation of the company belong to the company. This is well indicated as follows in the case of *State v. Public Service Comm.*, 325 Mo. 209, 30 S. W. (2d) 8, P. U. R. 1930E, 337, where the court said: "The authority of the commission to fix the value of the property of a public utility for rate-making purposes is a continuing power. If, in the judgment of the commission, it used the wrong method in arriving at the former valuation, or reached a wrong conclusion therein, it had authority in the present proceedings to consider a revaluation of the property unembarrassed by the former valuation. However, the fact that the commission had authority to revalue the property, which it had recently valued, does not mean that it should have done so unless some useful purpose would have been served by so doing. * * * It is also true that the city's agreement to accept the former valuation as conclusive was not binding on the commission. * * * There is no fixed rule for determining the fair value of property for rate-making purposes. All facts which shed light on the question must be given due consideration. * * * The report of the commission in the former valuation case (14 P. S. C. 193), to which all parties have made frequent reference, shows that the commission considered the capital structure of the company, book plant account inventory of the property, estimated investment in the property, cost of reproduction of the property, capital betterments since inventory, accrued depreciation, working capital, revenues and expenses, and going concern value. * * * It appears from the report of the commission that it gave due consideration to both investment cost and reproduction

cost less depreciation, as well as all other factors in connection with the property, and fixed a valuation much less than the estimated reproduction cost, although it was higher than the estimated investment cost. It is our judgment that the commission followed the proper method in arriving at the valuation of \$3,125,000, and there is nothing in the record that would warrant us in finding that it reached the wrong conclusion. * * * The depreciation reserve fund came from money which the customers paid for service, and for that reason it belongs to the company. Where, as in this case, such funds are invested in property which is being used in the public service, the company is entitled to a reasonable return thereon. However, where such funds are not invested in property devoted to public service, the company would not be entitled to a return thereon, and, under such circumstances, it would be improper to add the amount of such funds to the value of the property upon which the utility is entitled to a return. * * * This holding company charges the St. Joseph Water Company a fee of three per cent of its gross receipts for services which it is alleged the holding company renders the water company. The city contends that this three per cent charge amounts to a tribute levied by the holding company and the people should not be required to pay it. The holding company's ownership of the property includes the right to control and manage it, subject, of course, to state regulation through the public service commission. But it must be kept in mind that the commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business. The company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public. The customers of a public utility have a right to demand efficient service at a reasonable rate, but they have no right to dictate the methods which the utility must employ in the rendition of that service. It is no concern of either the customers of the water company or the commission, if the water company obtains necessary material, labor, supplies, etc., from the holding company, so long as the quality and price of the service rendered by the water company are what the law says they should be. * * * The evidence offered by the water company concerning the three per cent paid to the holding company and the services rendered therefor, stands undisputed. There is no evidence one way or the other except that offered by the water company. In the face of this uncontradicted evi-

dence we can not say that the holding company did not render valuable service to the water company, or that the three per cent charged therefor was not a reasonable charge. The holding company had a lawful right to manage the water company in the manner shown by the evidence, so long as the result of such management did not affect the rights of the public."

While the amount of discount on the sale of stock can not properly be regarded as an element of value in fixing reasonable rates, because the value of the plant is not affected by the sale, and to allow such a discount to be added to its value would put a premium on inefficiency of management and operation or of the plant itself, on the other hand this practice would place an efficient plant, in excellent financial standing, whose securities sell at par or better, at a corresponding disadvantage. This principle is established and its application indicated as follows in the case of *Florida Tel. Corp. v. Florida Railroad Comm.*, 47 Fed. (2d) 467, P. U. R. 1931C, 119, where the court said: "The amount of the discount is asked to be treated as an element of the value of the property acquired. The value of such property is not increased by a mere change of its ownership. The value after the sale would have been the same if, instead of appellant getting the amount of the price by selling its preferred stock at a discount, it had paid the price with cash it had in hand or which it obtained by disposing of its obligations or securities at the par or face value thereof. Such an expense so incurred by the buyer in getting the funds required to enable it to pay the purchase-price can not properly be regarded as an element of the value of the property bought, to be determined in fixing rates to be charged, that expense being one which need not have been incurred by a buyer whose financial condition or credit was such as to enable him to get funds on better terms."

§ 568. **Element of risk of investment affecting rates.**—The element of risk or hazard involved in the investment necessary to maintain a municipal public utility and furnish its service is properly considered in fixing the rate of return on the investment, because the element of uncertainty not only as to the return from the investment, but as to the security of the investment itself justifies an increasing return in proportion to the risk involved in the investment necessarily made to install and conduct the enterprise. This fact is recognized in the making of investments generally, for the rate of return decreases with the element of risk so that the return realized on government bonds or other equally good securities is a minimum rate, as com-

pared to the possible returns of a pioneer investment, which must necessarily look to future development for the most of its business upon which to realize profits, or where the undertaking must develop its own trade and attract customers to it, and the income from which is necessarily and properly above that received on a staple investment. This added inducement of a possible increased rate of return is necessary to induce capital to enter hazardous enterprises or attempt to develop a business in pioneer fields or to establish or develop an industry new to any particular locality.

Where there is a monopoly of the service, which bids fair to continue, and a contract relation between the local company and its parent system with a nation-wide credit field of operation, there is slight element of risk in the investment and as this affects the rate, some of the courts at least hold that, in the face of efficient service and management and the highest possible credit standing, a smaller rate of return for the service is reasonable. An interesting discussion of this principle and its application in practical business, together with the advantages of a contract connection between such companies is furnished in the case of *Chesapeake & Potomac Tel. Co. v. Commonwealth*, 147 Va. 43, 136 S. E. 575, P. U. R. 1927B, 484, where the court said: "It must weigh and interpret the evidence, but is vested with a fair discretion to determine the ultimate fact in issue; that is, the precise rate to be prescribed as reasonable and just in the particular case. The * * * statement of the commission as to its mental processes, while it may be subject to some criticism, when it is considered in connection with the evidence submitted and the painstaking review of it in their opinion, presents no sufficient reason for reversing their conclusions. * * * When the property of a public utility is to be valued, these differences are greatly multiplied in proportion to the extent and variety of the several items of property. The margin of uncertainty is always relatively large. The efforts of the valuation experts to simplify the question are vain. Such conflicting opinions are always and essentially mere estimates. They can not by formulas be transmuted into facts. * * * That the courts, while paying respectful attention to the estimates of these experts, as the best obtainable guide, have, even in three cases which are relied upon by the appellant, declined to accept as controlling the 'delusive exactness' of estimates similar to those relied upon by the appellant here, is apparent. * * * The company, in its valuation study, deducted only for the observed

and observable physical deterioration of the plant units which are in place, while the commission was of opinion that there should be a still further deduction based upon wear and tear, obsolescence, or inadequacy, resulting from age, physical change, or supersession by reason of new inventions and discoveries, notwithstanding the fact that the physical depreciation may not be presently observable. * * * In its reproduction study and effort to establish the highest possible value, the company seems to have omitted nothing, for there are the usual estimates for administrative and legal costs, for insurance and taxes during construction, for interest during construction, etc., and the commission seems to have agreed that such additions to the physical value are proper, though they did not always agree as to the precise amounts of such additions. What is called 'going concern value' is another item about which there are wide differences of opinion. * * * That the company is entitled to have its going concern value estimated, if possible, seems to be established. * * * It may be that the commission, in estimating the going concern value of this utility, made too great a reduction; but this can not be fairly decided without noting and weighing other relevant facts in the record. As has been so often said, there is no rule of thumb for ascertainment of such a gross value, but certain it is that in addition to investment cost, reproduction values less depreciation, and going concern value, all other relevant facts should also be considered in order to reach the ultimate figure. * * * The local company is a separate corporation. This is necessary under the Virginia constitution, and there can be no just criticism of the Bell System because of this fact. Indeed, we do not mean by the recital of these facts to criticize the American Company, the agreement, or the organization. So far as we know, this result has been honestly accomplished, and its great power has never been abused. It probably supplies, and will continue to supply, a telephone service to the people of this country which could not be as economically or as efficiently furnished by any other system. Our reason for emphasizing this complete subordination to and dependence of the Virginia Company upon the American Company is because we believe that this constitutes one of the most significant and relevant facts necessary to be considered in order to determine the ultimate facts to be determined in this case, (a) the rate base, especially going concern value as part thereof, and (b) a fair rate of return to the Virginia Company viewed as a separate entity. This is neither to assail their

agreements, nor to assert any control over them, nor to attempt either to annul or discredit them, but merely to scrutinize them and to recognize their significance as among the relevant facts of this case. * * * In that case the commission had excluded in its estimate of the company's expenses the four and one-half per cent on the gross earnings paid to the American Telephone & Telegraph Company for rentals and services under the agreement, and this exclusion the court held to be improper. In this case the Virginia commission has committed neither of these errors condemned in these cases. * * * That veil of mystery may have been slightly pushed aside, but has never been lifted, and the fair construction of the letter is that the American, as owner (sole stockholder) of the Virginia Company, derives a substantial profit directly from the separate operations of the Virginia and also from its cooperation as part of the system, including the profits produced through another subsidiary, the Western Electric Company. So that there are distinct but undisclosed advantages and pecuniary profits to the owner of the stock and property of the Virginia Company that are not reflected in the net earnings and dividends of the Virginia Company which are paid directly to such owner. There is the profit from sales and services of the Western Electric Company to the Virginia Company; there is the profit derived from the use of the facilities and agencies of the Virginia Company as well as from the interstate business which the Virginia Company does in aid of and for the benefit of the American Company. These profits can not be stated. The facts upon which some estimate thereof might be made are not disclosed. Perhaps the complications are so great that they can not be determined accurately, but the fact that they surely exist is as clear as any other fact in the case. * * * If it wished to realize on this value by a sale, who would buy unless assured of the friendly cooperation of and association with the Bell System. * * * In this view of the matter, while the Virginia Company has little separable going concern value, it has its due proportion (whatever that may be) of the going concern value of the Bell System. If that be very great because of the association, there is nothing in the record from which it can be even guessed at. * * * We agree with the commission that there should be a substantial reduction for the going concern value item included in the total because the Virginia Company, as a separate entity, has no power to sell, little control of its business, and no freedom to direct its own affairs. * * * It is argued for the appellant company

that it is unquestionably entitled to eight per cent return upon the rate base. If so, its owners have an assurance which can not be given to any investor in private enterprises. We do not construe the decisions of the Supreme Court of the United States to afford any such guaranty. * * * The high rate of return required a few years ago to attract capital to sound enterprises is no longer necessary. So that it seems to us perfectly certain that even if there were no other benefits a six per cent return upon the fair value of a property such as this is can not be held to be confiscatory. The risk is slight because of the fact that the revenues are quite fixed and certain, and the business is one which is not greatly affected by market fluctuation."

While the element of risk in the investment affects the rate, the amount varies with conditions and is relatively small where the business is firmly established in a fertile field without competition. Nor will original cost furnish a correct measure for present value which is the proper base upon which to determine a reasonable rate, and if this theory is not followed and the rate is accordingly confiscatory in its effect, it will be set aside as inadequate. These principles are established and discussed at length as follows in the case of Idaho Power Co. v. Thompson, 19 Fed. (2d) 547, P. U. R. 1927D, 388, where the court said: "The Idaho public utilities commission, defendant, is created by the state statutes, with functions usual to such bodies, and has the power and duty to require that the rates charged be just, reasonable, and nondiscriminatory. * * * We are to bear in mind, too, that the term 'reasonable' or 'just' return has a double aspect, one legislative and the other judicial, and that we are here concerned with it only in the latter sense. So understood, it is the equivalent of nonconfiscatory. Judicially a rate is unreasonable only when it yields a return less than the minimum which the capital invested may of right demand. * * * While appraisement, especially of power site land, is attended with the almost insuperable difficulties, we do not think that the original cost, where the property was acquired many years ago, is a correct measure. Some allowance should be made for overheads, but twelve and one-half per cent is thought to be excessive. * * * We are unable to see how present economy of operation is an element of going concern value. It may be a consideration which should be weighed in ultimately determining what is a reasonable return. If we adopt, as a standard, reasonably prudent and economical operation, a suitable reward is thus provided for unusual competency, and care and a penalty falls upon extravagance

and incompetency. * * * Some consideration, we think, should be given to what is designated 'coordinating and unifying physical properties,' for the reasons explained by plaintiff's manager. The real difficulty lies in the dearth, if not the absence, of evidence for an intelligent estimate. * * * The additions have been in response to demand, and have been but little in advance thereof. A comparatively short time intervenes between construction and compensated use, and upon completion the entire cost is added to the rate base. It is a natural growth. * * * Not whether plaintiff's property is worth less today than it was at some other period of its use, but whether, as it stands, it has the same fair value it would have if it were wholly new. The moment a pole is set in the ground, the process of deterioration begins. To ask us to hold that after it has been subject to such process for a period of five years, it is as valuable as a new pole, because it will give service for an additional period without replacement or reinforcement, is to urge us to set aside reason. * * * In all investments there is risk. It is involved, as well, in mortgage and other loans; otherwise, the private borrower would not have to pay double the rate paid by the government. Under the circumstances, the element must here be held to be relatively small. The utility serves a wide territory, generally agricultural, with many small urban communities. The basic industries are highly diversified agriculture and stock raising. These are permanent resources; they are not exhausted by use. Water resources for irrigation are apparently abundant, and great investments have been made in the construction of irrigation works. It is immaterial that some of these enterprises may not have been financially feasible, and will entail loss upon the investors. The systems have been constructed, and are enduring resources for use, whatever may ultimately turn out to be their reasonable capitalization. Electric current has come to be recognized as one of the prime necessities of our modern life, for numerous uses. * * * We would have difficulty in believing that, with reasonable assurance of honest and efficient management, an investment of that character, with seven per cent return so paid, would be unattractive. At least we are unable to conclude that under such circumstances rates yielding a return of seven per cent or over, so paid, would in any proper sense be confiscatory. * * * We are convinced that the rates are insufficient to cover bare operating costs, and for that reason the schedule is held to be invalid."

§ 569. Expenses of maintenance and operation.—It is axiomatic that the expense of operation and maintenance, which is always required to furnish efficient service, must be met out of the proceeds received for the service rendered, because this expense is necessary and must be met as a condition precedent to the continued maintenance of the business and its operation necessary to furnish its service. Where this element is not properly recognized the service necessarily suffers and the plant depreciates with the result that in a comparatively short period the service becomes unsatisfactory and entirely insufficient. To enjoy satisfactory and sustained service operating and maintenance costs must be met fully and fairly.

In fixing the expenses of maintenance and operation, evidence of increased costs of production, as well as decreased sales, is valuable and should be furnished by the company, rather than estimates on the subject, and while the commission has no right to direct business policies for the company, it may allocate operating costs and expenses to different classes of service according to the sales made to each class, as is indicated in the case of *Pittsburg & West Virginia Gas Co. v. Public Service Comm.*, 101 W. Va. 63, 132 S. E. 497, P. U. R. 1926D, 280, where the court said: "The burden is upon the utility asking for increased rates to prove that they are just and reasonable. *Gas Co. v. Public Service Commission*, 121 S. E. 716, 95 W. Va. 557. It will be observed that when the case was submitted nearly one-half of the year 1925 had expired, but there was no effort then made to reduce the estimates formerly submitted, to actual results. The best evidence would have been the decrease in gas sales and increase in costs of production covering the months then expired. The commission was entitled to the best evidence available. Past experience may always be considered in resolving future probabilities. We can not say that the commission acted without evidence; nor can we say that the estimates of decreased sales and increased expenses founded largely upon conjecture should outweigh the actual facts and figures considered by the commission. While we do not find in the record a written statement by the commission of its reason for the entry of the order, as contemplated in section 16, c. 150, of the Code, the order recites that the case was heard upon the evidence taken, the schedules filed, the audit and report by Williamson, and the proceedings theretofore had. The courts do not attempt to weigh conflicting evidence in rate cases, and will not interfere with the rates fixed, unless the commission has acted so arbitrarily and un-

justly as to fix rates contrary to evidence or without evidence to support them. * * * Counsel for the commission in his brief says that the commission has adopted a policy of taking care of losses suffered by a utility in fixing rates for the future. There are recent decisions which hold it proper to make good losses, suffered under protest, by the next rate revision. *Penn. Gas Co. v. Public Service Commission of N. Y.*, 207 N. Y. S. 599, 211 App. Div. 253, and many cases there cited. Complainant is not without remedy before the commission. * * * The commission fixed the rate base for these industrial and domestic consumers by allocating to them fifteen per cent of the entire property and eighty-five per cent to the wholesale consumers, according to the gas sales of each. The commission has advanced no reason for this allocation (no opinion being written), but its counsel says this method has appealed to the commission in this and other cases as being a fair basis of apportionment. What is the value of the property used and useful for the service of these 4,800 consumers? We find no attempt to approximate it. The initial cost values of the distribution lines and equipment are shown to be \$198,283.37, and the commission, on the above allocation, made the value for rate purposes, \$1,600,558.05. Using the book value as the base rate for the entire property the commission found the net income for 1924 to be \$2,351,578.47 (including income from gasoline, \$94,408.76), which gave a return of 16.72 per cent upon the value of the entire property, a profit sufficient to allow eight per cent on the investment, and eight and seventy-two hundredths per cent to take care of amortization, depreciation, and depletion; the life of the operation being estimated at fifteen years. As before stated, we are not justified in finding a different rate base. The rates now fixed bring in a fair return upon the entire property and are not confiscatory. That was the result in 1924, and sufficient evidence has not been brought before the commission, in its opinion, to make an increase in rates for 1925. We are not disposed to say the commission has erred in weighing that evidence. * * * So, allocating the property used and useful in the entire plant between the wholesale and domestic consumers, and the expense incurred common to both classes, upon the basis of gas sales, apportioning the revenue upon the basis of actual sales, and apportioning the distribution expense to the domestic and industrial business, the commission has found that the earnings from the industrial and domestic consumers were \$281,638.30, or 17.60 per cent upon the rate base allocated to them. * * *

We presume the criticism is on the ground that the depreciation and the item available for return are taken care of by allowing eight per cent for amortization, depreciation, and depletion. However, actual experience of the utility demonstrates that the study of costs as made in the Scharff exhibits is unsatisfactory. The actual profit, including \$94,408.76 from net gasoline earnings, could not have been realized if they be true. So we can not say the commission erred in not accepting as controlling the Scharff evidence and exhibits. We can not substitute our judgment for that of the commission (composed of experts in such matters) on questions as to what would be for the best interests of the utility and the public served by it. But we return to the contention that there was an improper allocation of the rate base among the two classes of consumers on the basis of gas sales, in order to determine the property used and useful in the service of each. We perceive no good reason for condemning this method of allocation. We note that it has been used by other commissions, apparently without criticism. * * * A utility of this character may classify its consumers and charge different rates according to the service rendered, based upon the varying costs for that service, all subject to the control and supervision of the public service commission, which may adjust rates to them as may to it seem just and proper. Rate making is the exercise of legislative power, and, where there are disputed facts, and the commission (the legislative authority) acts upon disputed facts, its action will not ordinarily be reversed by the courts, unless its conclusions are reached by applying wrong legal principles to facts clearly disclosed. In determining whether the rates are confiscatory, the courts will review the evidence to see if the commission has based its finding of fact upon a mistake of the evidence or without evidence."

After paying taxes, ordinary fixed charges, and operating expenses including depreciation, the company is entitled to receive and the customer obliged to pay at a rate sufficient to produce a reasonable return on the value of the property, necessary in rendering the service, and, where this is not done, past losses will not support a claim for unreasonably high rates, any more than excessive past profits would justify confiscatory rates for the future, unless such rates were fixed by the commission, for as the court said in the case of Board of Public Utility Comrs. v. New York Tel. Co., 271 U. S. 23, 70 L. ed. 808, 46 Sup. Ct. 363: "The record shows that the rates in effect prior to the temporary injunction were not sufficient to produce revenue enough to pay

necessary operating expenses and a just rate of return on the value of the property. * * * It is conceded that unless, as directed by the board, depreciation expense is reduced below what the board itself found necessary and net earnings are correspondingly increased, the rates can not be sustained against attack on the ground that they are unreasonably low and confiscatory. * * * The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory. * * * Constitutional protection against confiscation does not depend on the source of the money used to purchase the property. It is enough that it is used to render the service. * * * The company is entitled to just compensation and, to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. * * * The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses including the expense of depreciation is the company's compensation for the use of its property. If there is no return or if the amount is less than a reasonable return, the company must bear the loss. Past losses can not be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. * * * And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past can not be used to sustain confiscatory rates for the future. * * * By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. * * * The property or money of the company represented by the credit balance in the reserve for depreciation can not be used to make up the deficiency."

§ 570. **Physical depreciation and obsolescence.**—The item of functional depreciation or obsolescence is equally important with that of ordinary physical depreciation, which is common to the operation of all municipal public utilities, for the replacing of machinery and other equipment of the modern plant employing electricity or some other recently discovered force, upon which the element of invention and improvement is so frequently mak-

ing such decided changes in the manner of operating and providing service, frequently necessitates the complete abandonment of the machinery and other equipment then on hand for the new invention or discovery of a different force or an improved method or process of utilizing that already discovered. In order to furnish the best service at the least cost the most approved methods, machinery and equipment available at any particular time are necessary, and this requires that the equipment then on hand, no matter how recently acquired nor how perfect its condition, which has become obsolete, be abandoned. Adequate service means the best that is available furnished under the latest and most approved methods. In such cases it is necessary to replace equipment, not when that on hand is worn out and no longer capable of serving the purpose for which it was acquired, but at any time that a better and more improved instrument for furnishing the service is placed on the market, and this generally results in consigning the former equipment to the scrap heap as though it were entirely worn out. The loss, therefore, which is due to new processes or inventions and functional depreciation, as well as to ordinary physical depreciation, must be considered an expense of operation. This item, however, may often be charged to the expense of operation rather than added to the capitalization upon which dividends are expected, because it is generally a current expense incurred in connection with operation and not a new increased investment of capital in the business. Where improved machinery is installed, which is required by a new process or patents and which permits a decreased cost of production, it is properly charged to capital account.

Accrued, functional depreciation or obsolescence belongs to the company and can not be used or considered to sustain future confiscatory rates, because its purpose is to replace property of the company, which has been used up or abandoned. Past losses will not support a claim for unreasonable rates in the future, nor can they be used to enhance the value of the property, any more than past profits from an excessive rate or accrued functional depreciation can be considered in fixing reasonable rates for the future. These principles are established and discussed as follows in the case of *Elkins v. Public Service Comm.*, 102 W. Va. 450, 135 S. E. 397, P. U. R. 1927B, 270, where the court said: "The chief issue presented involves the value of the applicants' property used and useful in the public service. In determining rates, the commission fixed the rate base, or value of the physical property plus going value and working capital, at \$3,000,000.

Because of a large accrued depreciation reserve, amounting to \$2,039,407.35, and the fact that only a small fractional part of the capacity of applicants' plant is being used in serving the public, the protesting consumers contend that the valuation is excessive to an amount equal to the depreciation reserve which they say should be deducted from the gross investment or book value of \$3,791,258.20, in ascertaining a fair value of the physical property. * * * The United States Supreme Court has recently held in several cases that the public does not have any interest in accrued depreciation reserve, and that in rate making it can not properly be charged to the utility. 'The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses, including the expense of depreciation, is the company's compensation for the use of its property. If there is no return, or if the amount is less than a reasonable return, the company must bear the loss. Past losses can not be used to enhance the value of the property, or to support a claim that rates for the future are confiscatory. *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 395, 42 Sup. Ct. 351, 66 L. ed. 678; *Georgia Ry. v. R. R. Comm.*, 262 U. S. 625, 632, 43 Sup. Ct. 680, 67 L. ed. 1144. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past can not be used to sustain confiscatory rates for the future. * * * Taking into consideration the excessive capacity of the plant for the service rendered, and rejecting the theory that the depreciation reserve should be deducted from the value of the physical property, the finding in our opinion was well within the discretion of the commission. * * * A public service company, furnishing natural gas to the public, is entitled to a fair return upon the present fair value of its property used and useful in the public service, to be ascertained as of the time the service is rendered. *City of Charleston v. Public Service Commission*, 95 W. Va. 91, 120 S. E. 398. * * * This rule is subject to only the condition that a utility will never be permitted to charge more than the value of the service which it is rendering. We do not find sufficient cause in the action of the commission determining the rate of depreciation reserve, or of any other factor necessary for establishing a proper rate, justifying setting aside or modification of the order complained of."

Since the quantity and value of natural gas in the ground is highly speculative, the rental costs or values of leased property,

rather than the value of the property itself, is the proper rate base, and therefore actual cost, rather than reproduction cost, would seem to be the more equitable measure for arriving at the proper valuation. Earning capacity can not be used because that is determined by the rate and using this as a basis for fixing rates would be arguing in a circle. Depreciation in natural gas cases must be sufficient to equal or replace the capital account during the producing life of the plant, and as there is uncertainty in the average life of such a plant, the element of risk is always present. Where, as frequently happens, such a plant serves several communities, in fixing a rate base for any community, the investment should be apportioned generally according to sales in addition to the actual cost and expenses of operation of the distribution system in each locality. Where gasoline is extracted as a by-product of the natural gas business, the net earnings of this branch of the business should be included in the earnings of the plant. The fact that franchises may expire in certain localities does not make a continuance of the business illegal where the enterprise is considered as a state venture and not merely a local or municipal one. The right and corresponding obligation to continue the service remains where the company is still operating in the state and it may not abandon part of its business, so long as it continues to serve in the state under authority granted by the state. This question of depreciation and other matters concerned with rate regulation is clearly and fully discussed as follows in the case of *United Fuel Gas Co. v. Railroad Comm. of Kentucky*, 13 Fed. (2d) 510, *affd.* in 278 U. S. 300, 73 L. ed. 390, 49 Sup. Ct. 150: "We think that it must be conceded that the company has a right to hold, as used and useful in its business, reserve or undeveloped gas acreage, in which to prospect for gas. Much of this may prove unprofitable, but it is necessary for the continuance of the life of the business. It is conceded by the protesting cities, also, that, in estimating the reproduction cost new, overhead expenses during construction may be included as part of such cost. * * * Where the rates are reasonable, therefore, and the company is required only to perform its common-law obligation, the court would seem to be without general equity jurisdiction to enjoin, and there would seem, further, to be no violation of the federal Constitution. Certainly the mere fact that a state statute is claimed to violate the state constitution is not ground for invoking the jurisdiction of the federal district court, except pending a determination of the question of confiscation. The suit should proceed for the

purpose of determining whether the maximum rates fixed by the commission are confiscatory, but, if found to be not confiscatory, a permanent injunction should nevertheless issue to restrain the enforcement of penalties accrued *pendente lite*.

* * * If the rates are determined to be confiscatory, a permanent injunction would of course issue as to their enforcement. In determining the value as of the time when the inquiry is made regarding rates, it would seem that the reproduction value at such time is the dominant element, although not the only element, for consideration. The various elements which are properly considered in arriving at the value of a public utility property have been repeatedly announced by the Supreme Court of the United States. * * * The natural gas business presents an anomalous situation in the application of the principles of present fair valuation, at least so far as gas-producing real estate is concerned. It must be conceded that the natural gas industry has taken its place in the category of public utilities, and that, as such, its property is devoted to the public use and charged with a public trust. The company is entitled to earn only a reasonable return upon the value of its properties. Can such a company be said to own the natural gas in the ground, which it has in no sense produced, as one might produce manufactured gas, electricity, or transportation, which has intrinsic worth and value only when reduced to possession, and which is marketed in its natural state, without manufacturing process? And, if such ownership can exist, may the company place an arbitrary value upon such gas unrecovered, or capitalize the earning power created by the right to extract it, beyond the actual investment in acquiring this easement? The location and quantity of natural gas below the surface of the earth is at best highly speculative, and when such gas is once exhausted it can not be reproduced or replaced. Because of the exhaustible character of his product, the natural gas operator is entitled to receive through the rates charged, not only his actual expenditures of operation and depreciation charges, in the sense of such sum as will keep his plant at one hundred per cent operating efficiency, but he is also entitled to such rates as will refund to him his entire capital investment within the life of the business.

* * * The right to this amortization or depletion reserve, or the right of the company to earn such sum as would reimburse the investor for his original capital investment at the termination of the business, is universally recognized. This is in addition to what is ordinarily denominated a charge for depreci-

ation or deterioration by use. So far as this factor alone is considered, it would seem quite manifest that such amortization or depletion reserve must be calculated upon the investment, and not upon the present value of the so-called acreage. The investor is entitled to reimbursement through this reserve only to the extent of his original investment, plus a reasonable earning during the period of operation. In the ordinary utility, the law contemplates an indefinite continuance of the business, and allows no earnings in excess of a reasonable return, which will ultimately return to the investor the amount of his capital investment in cash. In a natural gas utility, we must look forward definitely to the complete exhaustion of the gas supply and the termination of the business upon a future day, which is certain to come. * * * If the exchange value at any time is held to be the measure of the amount which may be so returned to the investor, through amortization or depletion reserve, then the operator will, at the termination of his business, receive not only a reasonable return during the life of the business and his entire investment at its termination, but in addition to these he will receive, as profit beyond what is reasonable, the unearned increment of value claimed to attach to proven territory. * * * Conceding that, for purposes of amortization or depletion reserve, the original investment alone can be considered, it remains to be determined whether, for purposes of computing a reasonable return, from time to time, the appreciated value claimed for such acreage is to be included in the rate base. Although the present case would seem to be a peculiarly apt instance for application of the very forceful and compelling reasoning of Mr. Justice Brandeis in his concurring opinion in the case of *Southwestern Telephone Co. v. Public Service Commission*, 262 U. S. 276, 289, 308, 43 Sup. Ct. 544, 67 L. ed. 981, 31 A. L. R. 807, because of the extreme uncertainty as to values and the speculative evidence thus elicited, we feel bound by the majority opinion in that case, as well as the unvaried decisions in other cases, to value this acreage at its present fair value, if this appears from the evidence. * * * Both methods have in contemplation the value of the use, and both consist of capitalizing the earning power of the properties in arriving at their value. The fallacy of this argument, that, because of the earning capacity and large return allowed, the property has greatly increased in value, and that such increased value should thereupon be taken as the basis for another calculation of a still large return, would seem quite apparent. The fallacy of valuing the use upon the

earning capacity, and then fixing rates upon the value thus determined, has been observed by Mr. Justice Hughes in the Minnesota Rate cases, 230 U. S. 352, 461, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, and by Mr. Justice Brandeis in his concurring opinion in the Southwestern Telephone Co. case, *supra*. See, also, the following cases, to the effect that earning power, in the sense of good will or franchise value, must be excluded from consideration in arriving at the rate base. * * * "This vicious pyramiding would go on and on, until the point would be reached where the public would cease patronizing the utility rather than pay the price. The net result would be that the public would always be compelled to pay "all the traffic would bear," and governmental regulation of the prices to be charged would be at an end. Its only function in that respect would be to prevent discrimination." *City of Charleston et al. v. Public Service Commission et al.*, 95 W. Va. 91, 120 S. E. 398.

* * * Practically all of this class of property is held by the complainant under gas leases which convey no interest in the real estate, but give only the right to explore for and extract natural gas. Not only are percolating waters and oil and unrecovered gas in the ground not the subject of ownership until recovered, but, if the subject of ownership, such gas is the property of the owner of the fee until recovered. Not only has such gas no value unrecovered in the ground, but such value as it might have would seem to be the property of the lessor. There are a few cases pertaining to natural gas properties which recognize that, if a sound value of gas-producing real estate be proved, such valuation is to be taken into consideration in arriving at the rate base. *City of Erie v. Public Service Commission*, 278 Pa. 512, 123 Atl. 471, and *Pennsylvania Gas Co. v. Public Service Commission*, 211 App. Div. 253, 207 N. Y. S. 599, are cited. In these cases it is to be noted that a value other than that based upon earning capacity was proved. In the present case the record is devoid of such evidence. If the theories of Mr. Uebelacker, based on the valuation of gas in the ground, and of the other witnesses, based on the exchange value of the acreage, both ultimately involving a capitalization of earning capacity, be rejected, the only remaining evidence in the case is that of book or investment value, and this is argumentatively corroborated by recent costs of securing additional or new leases. No evidence was introduced tending to show that the present leases were peculiarly advantageous to the company. Before the property is brought into production, nominal rentals alone are

charged, and these are debited to expense. After the property becomes producing, a royalty is paid based upon the quantity of gas extracted. * * * The conditions of rental seem to be standardized, and the terms to be considered mutually fair, the return to the lessor adequate. Under such circumstances the best, if not the only, evidence of value in the record is the investment value. * * * In valuing the plant for purposes of arriving at the rate base, a charge for interest upon capital during construction is proper. *Ohio Utilities Co. v. Public Utilities Commission*, 267 U. S. 359, 69 L. ed. 656, 45 Sup. Ct. 259. It is also true that in some natural gas projects the highly speculative nature of the investment would necessitate high interest rates. But in determining what rate of interest should be applied in any specific case the nature of the business involved must be considered. Here the element of speculation is reduced to a minimum. The properties are proved and producing, and were so when the company was organized. The markets are established. The company is the subsidiary of two other large, substantial, successful corporations. There are not, and never were, any of the elements of the speculative, 'wildcat' venture. We are of the opinion that the seven per cent interest rate conceded by the witness Hagenah, for the protesting municipalities, is sufficient, even generous. It is common knowledge that when a large public utility desires to market its securities, it usually secures the services of an underwriting syndicate. Such syndicate underwrites the bonds or stocks at a definite figure, and the company is not thereafter concerned with the market price at which they are sold. * * * And, when securities are sold at a discount, such discount is no less a portion of the cost of procuring funds than is a higher rate of interest, which would enable the company to sell the securities at a premium. In both cases the expenses of the syndicate are absorbed by the spread between the syndicate and the market prices. * * * A charge for 'cost of financing' is so indefinite—so possible to occur or not occur in the establishment of a business enterprise—and so close to the border line that we are disposed to allow it, but only as a part of the 'going concern' value. * * * It is extremely difficult to conceive of any other elements which might go into the property to increase its value as an entirety over the aggregate of component parts, and we must not, in the name of going concern value, sanction the inclusion of mere good will as predicated upon earning capacity. * * * It therefore now becomes necessary that the determined rate base and the operating expenses

be apportioned to the localities with which we are particularly concerned. We are of the opinion that production expenses and valuation, general property valuation, general expenses, and working capital should be apportioned on the proportionate sales basis, transmission, system valuation, and expenses upon the demand mileage basis, and distribution upon actual valuation of the distribution plants in the several municipalities and actual expenses there incurred. Overhead expenses may be figured at eighteen per cent of the total valuation of physical plant allocated to the particular municipality, and going concern value at approximately ten per cent of such physical plant valuation so allocated. * * * For some years the United Fuel Gas Company conducted this enterprise of gasoline extraction as a department of its natural gas business. So conducted, gasoline would seem to constitute a by-product of the natural gas business, as clearly as coke, tar, and ammonia are by-products of manufactured gas. The business proved to be highly successful. * * * Viewing the gasoline as a pure by-product of the natural gas business, we are of the opinion that earnings should be increased, or operating expenses decreased, by some fair apportionment of the earnings from this branch of business. * * * We are of the opinion that the application of one-half of the net earnings to the gas business is in no wise unreasonable, since this will also afford a most generous return on the value of the property used for extraction purposes. * * * This depreciation, having in view the replacement of equipment as it wears out or is consumed, must be figured upon the appraised value rather than investment cost. * * * We are of the opinion that the six per cent annual charge upon the entire property or rate base, as claimed by the complainants, is sufficient to provide for both depletion and depreciation as above defined. The company has been in operation for approximately fifteen years, and the estimated future life of the field is conceded to be about eighteen years. At the expiration of this period the company will have been in operation approximately thirty-three years. * * * The court is not to fix the rate, but solely to determine whether the rate fixed is confiscatory. This we are constrained to hold does not appear from the evidence. * * * The mere fact that the franchises in the various cities have expired does not make the continuance of this business illegal, for, under section 23 of the Railroad Commission Act, the enterprise is now to be considered a state venture, and not a municipal one. The state is the unit, and not the municipality. There is no obligation to

continue in the state, but, if they do continue in the state, they are subject to their common-law and statutory duties in all parts of the state—county, township, and municipal. This would not only seem to be the result of recent legislation, but also to be the trend of judicial view in Kentucky and elsewhere. See *Southern Railway Company in Kentucky v. Hatchett*, 174 Ky. 463, 192 S. W. 694, L. R. A. 1917D, 1105; *North Carolina Public Service Co. et al. v. Southern Power Co. (C. C. A.)*, 282 Fed. 837, 844, 33 A. L. R. 626; *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 277, 30 Sup. Ct. 330, 54 L. ed. 472; and *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 Sup. Ct. 658, 67 L. ed. 1117, 32 A. L. R. 300; also, *N. Y. ex rel. Gas Co. v. McCall*, 245 U. S. 345, 38 Sup. Ct. 122, 62 L. ed. 337. * * * Clearly a utility can not abandon part of its business, because the rate is not entirely satisfactory, while operating as to the remainder.”

Where provision has been made for amortizing the entire plant within a comparatively short defined period, the allowance for depreciation should be limited to ordinary wear and tear of operation, for as the court said in the case of *United Fuel Gas Co. v. Public Service Commission*, 14 Fed. (2d) 209, *affd.* in 278 U. S. 322, 73 L. ed. 402, 49 Sup. Ct. 157: “The plaintiff is entitled to set aside annually such sum as will be needed to keep its physical plant as good as new in so far as that is possible, or, if possible, desirable, and in addition, such sum as will at the end of the estimated length of the profitable life of its plant, make good its value. * * * When, however, provision is made for the amortization of the plant as a whole at the end of a definite and not very long period, the allowance for depreciation may properly be confined to the sums necessary to keep it, in the meanwhile, up to a high state of industrial efficiency. * * * The commission allows for amortization a sum equivalent to four and fifteen hundredths per cent of the fair value of plaintiff’s property. This is clearly more than sufficient. It does not take quite three dollars and ninety cents paid in at the end of each of eighteen years, compounded annually at four per cent, to amount to \$100 at the time the last payment is made. The plaintiff’s expert witnesses say that the probabilities are that it has considerably more than eighteen years of profitable business life ahead of it.”

Depreciation must take care of up-keep and repairs and also replace such property as is used up in rendering the service. A natural gas plant perhaps furnishes the best illustration of the last item, since the supply is exhausted during the life of the

plant and a sum sufficient to equal its value must be allowed for functional depreciation or obsolescence during the life of the plant. Larger mains to replace insufficient smaller ones must also be covered by depreciation, which is physical, and naturally ordinary wear and tear must be provided for in order to maintain the plant in an efficient condition for service, which item is not properly chargeable to capital account but should be carried in the operating cost account. This principle and its proper application is well expressed as follows in the case of *Fort Worth Gas Co. v. Fort Worth, Texas*, 35 Fed. (2d) 743, P. U. R. 1930C, 203: "It must be determined whether the rates complained of are yielding, and will yield, over and above the amount required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed in furnishing the service. Such a rate is a reasonable rate of return, and must be made on the value of the property at the time of the investigation and for a reasonable time in the immediate future. *McCardle v. Indianapolis Water Co.*, 272 U. S. 408, 47 Sup. Ct. 144, 71 L. ed. 316. * * * The master's method of calculating the amount of the annual depreciation is not impressive. It seems to us that the evidence as a whole supports the conclusion that the life expectancy of the physical property does not exceed twenty-five years. The property must be repaired from time to time, as parts thereof wear, and necessarily smaller mains must be replaced with larger, because of the increase in population. It is not likely that there will be any balance to fund. Consequently the company should be allowed to set up an annual depreciation of at least four per cent on the value of the physical property, which means three and six tenths per cent on the rate base. Considering the favorable situation of the plaintiff company, as found both by the railroad commission and the master, and which appears to be reasonably supported by the record, we are not prepared to say, as a matter of law, that a net return for compensation of seven per cent will amount to confiscation."

§ 571. No element of good will unless competition in field.—Where the element of competition is lacking so that the municipal public utility enjoys the privilege of furnishing all the service due to the fact that it has an actual monopoly of the field, as is quite generally the case under commission control, at least as to the establishment of new plants, the stability of the investment, as well as the probability of permanently realizing profits, justifies a reduction of the rate in the commission form of

regulation, as compared with a case where there is competition in the field, for this necessarily restricts the volume of the business and injects an element of risk and uncertainty in the question. Where, however, the degree of uncertainty is controlled by the difference between the two cases—one where the franchise is practically exclusive for the time being and the other where it is legally or virtually so, and the company enjoys an actual monopoly of the business, the element of good will is not properly included, because its customers are retained by compulsion, as they are obliged to accept service from the particular municipal public utility or go without. As the element of good will necessarily involves the right of the customer to choose, where there is no such right because the municipal public utility enjoys a monopoly of the business, this element should be disregarded.

§ 572. **Going concern with established income.**—The fact that the municipal public utility is a going concern and has an established business with the necessary connections made to furnish its service and is actually furnishing satisfactory service to its customers is an element properly included in the investment in fixing the rate for the service. The fact that the company is a going concern in full operation, not only with the capacity to furnish service and to enjoy the value received therefor, but that it is a system actually supplying service and enjoying a fixed income from the earnings of such service is an important and essential feature which is properly included in the inventory of such a business in determining by a valuation the amount of the investment on which the company is entitled to receive a reasonable income. This is also true in cases of actual competition.

That an operating plant with customers using its capacity for service is of greater value than one not in operation is an obvious fact upon which the courts are agreed. The difficulty is in determining the proper amount to allow for this item and while some cases fix a definite amount and others fix a certain percentage, in many instances the item is not valued separately but is considered in fixing the value of the plant as a whole. The method of arriving at a reasonable rate and the necessary facts upon which to base it, as well as the proper rate of return, must all be determined. In fixing going-concern value and the proper rate, the court, in the case of *Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Comm.*, 11 Fed. (2d) 319, P. U. R. 1926D, 13, said: "As we said in our previous opinion, we think

that the Supreme Court has now adopted the rule that, at least in the absence of special circumstances controlling otherwise, and not present here, the dominant element in the fixing of a rate base in a case such as is now before us is the reproduction cost, less depreciation, of the property involved. This is not to doubt that there are many situations in which reproduction value would be a less controlling element; but this case, in our judgment, lacks the features which might have that minimizing effect. * * * It is our judgment that, under the known past and present and the reasonably expected future economic conditions, and when by statute or court order the commission retains jurisdiction to change rates from time to time, up or down, a court should consider a commission-made rate as if it were not to continue by its own force for more than three years. * * *

To this physical property item must be added a suitable allowance for working capital. The commission has allowed \$25,000 for that item. We stated in our previous opinion that the evidence indicated \$30,000 to be a proper minimum sum, and we see no reason now to doubt the correctness of that conclusion. * * *

For this going value, the utility claims an additional sum of \$65,000; while the commission, according to its computation, allowed a little less than \$6,000. * * *

At the same time the proposition that a plant of this kind, and in this business, and in successful operation, with customers somewhat permanently attached for its capacity output, is worth ten per cent more than the skeleton would cost, seems not unreasonable—no circumstances contra appearing. * * *

It is, however, due to the parties who have fully argued the matter, and to making an end of litigation, that we should express our opinion as between plaintiff's claim of eight per cent and the commission's expressed intention to allow seven per cent. With the rate base increased to the amount which we have specified, with the liberal return the utility has received from February, 1922, to March, 1924, with its now established prosperity and credit, with the fair treatment as to its disbursements which it has received from the commission, and which in other respects we are prescribing, and particularly with the declared willingness of the commission to allow a return of eight per cent as this may be brought about by an increased volume of business and by more efficiency, we conclude that, under all the circumstances disclosed by the record, including the payment of the corporate federal income tax, a seven per cent return would not be confiscatory."

§ 573. **Sliding scale**—Increased earnings with decrease in rates.¹—The fixed rate can be reduced without materially affecting the net income by improving the service and extending the field to which the service is furnished, because a reduction in the rates, as well as the improvement and extension of the service, will naturally result in increasing the volume of the business with the effect of increasing the net income sufficiently to permit of a reduction in the rates without actually decreasing the net income; unless it be in the case of the municipal public utility providing telephone service where the increase in the volume of the business seems not to be attended with the ordinary relative decrease in the cost of the service or the expense of operating the system. Recognition of this fact is the basis of the so-called sliding scale, whereby the interest or return on the investment which the municipal public utility is permitted to earn is increased as the rate charged for the service rendered is decreased. That the desire for increasing the amount of the earnings or income on the investment, which under this system automatically decreases the rate received for the service, may not result in decreasing the standard and quality of the service and in such depreciation of the plant as ultimately to result in its destruction, the application of the sliding scale as a method of regulating rates must be accompanied by a definite standard of service and a strict requirement that the service be kept up to the standard. With this safeguard, however, the plan in certain cases is advantageous in that it furnishes a motive for the municipal public utility voluntarily to reduce its rates which is naturally accompanied by an increase in the volume of its business and so by a net increase in its income.²

¹ This section (§ 463 of second edition) quoted in *Bertha A. Mining Co. v. Empire Dist. Elec. Co.*, 210 Mo. App. 622, 235 S. W. 508.

² *United States. Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418, mod. in 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. 888; *San Diego Land & C. Co. v. National City, California*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804; *San Diego Land & C. Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. 571; *Stanislaus v. San Joaquin & Canal & Irr. Co.*, 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 241; *Ope-*

lika, Alabama v. Opelika Sewer Co., 205 U. S. 215, 68 L. ed. 985, 44 Sup. Ct. 517; *Knoxville, Tennessee v. Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *Railroad Comm. of Louisiana v. Cumberland Tel. & T. Co.*, 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. 357; *Omaha, Nebraska v. Omaha Water Co.*, 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. 615, 48 L. R. A. (N. S.) 1084; *Lincoln Gas & Elec. Light Co. v. Lincoln, Nebraska*, 223 U. S. 349, 56 L. ed. 466, 32 Sup. Ct. 271; *Simpson v. Shepard*, 230 U. S. 352,

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Ohio. Newark Nat. Gas & Co. v. Newark, 92 Ohio St. 393, 111 N. E. 150, P. U. R. 1916F, 1033, aff'd. in 242 U. S. 405, 27 Sup. Ct. 156, 61 L. ed. 393, Ann. Cas. 1917B, 1025; Portsmouth v. Public Utilities Comm., 108 Ohio St. 272, 140 N. E. 604, P. U. R. 1923E, 834; Cincinnati v. Public Utilities Comm., 113 Ohio St. 689, 150 N. E. 48, P. U. R. 1926C, 694; Logan Gas Co. v. Public Utilities Comm., 115 Ohio St. 107, 152

N. E. 648, P. U. R. 1926D, 769; *Celina v. Public Utilities Comm.*, 116 Ohio St. 596, 157 N. E. 72, P. U. R. 1927D, 796; *Hardin-Wyandot Lighting Co. v. Public Utilities Comm.*, 118 Ohio St. 592, 162 N. E. 262, P. U. R. 1928D, 500; *Portsmouth Home Tel. Co. v. Public Utilities Comm.*, 120 Ohio St. 12, 165 N. E. 354, P. U. R. 1929C, 654; *Greenville v. Public Utilities Comm.*, 124 Ohio St. 431, 179 N. E. 131, P. U. R. 1932B, 273; *Parks v. Cleveland R. Co.*, 38 Ohio App. 315, 176 N. E. 472, *affd.* in 124 Ohio St. 79, 177 N. E. 28, P. U. R. 1931E, 321.

Oklahoma. *Pioneer Tel. & T. Co. v. Westenhaber*, 29 Okla. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209; *Hine v. Wadlington*, 33 Okla. 173, 124 Pac. 299; *Pioneer Tel. & T. Co. v. State*, 64 Okla. 304, 167 Pac. 995, L. R. A. 1918C, 138, P. U. R. 1918A, 465; *Nowata County Gas Co. v. State*, 72 Okla. 184, 177 Pac. 618, P. U. R. 1919C, 40; *Muskogee Gas & Elec. Co. v. State*, 81 Okla. 176, 186 Pac. 730, P. U. R. 1920C, 806; *Okmulgee Gas Co. v. State*, 85 Okla. 44, 204 Pac. 443, P. U. R. 1922C, 740; *Oklahoma Nat. Gas Co. v. Corporation Comm.*, 90 Okla. 84, 216 Pac. 917, P. U. R. 1924A, 132; *Consumers Gas Co. v. Corporation Comm.*, 95 Okla. 57, 219 Pac. 126, P. U. R. 1924A, 743; *Okmulgee Gas Co. v. Corporation Comm.*, 95 Okla. 213, 220 Pac. 28, P. U. R. 1924B, 249; *McAlester Gas & C. Co. v. Corporation Commission*, 102 Okla. 118, 227 Pac. 83; *American Indian Oil & C. Co. v. Poteau*, 108 Okla. 215, 235 Pac. 906, P. U. R. 1926A, 236; *Pressure Oil & C. Co. v. Tri-City Gas Co.*, 108 Okla. 248, 236 Pac. 41; *Oklahoma Nat. Gas Co. v. State*, 110 Okla. 297, 236 Pac. 893; *Oklahoma Nat. Gas Co. v. Corporation Commission*, 111 Okla. 6, 237 Pac. 838, P. U. R. 1926A, 554, *cert. denied* in 275 U. S. 489, 72 L. ed. 388, 48 Sup. Ct. 32; *Shawnee Gas & C. Co. v. Corporation Commission*, 111 Okla. 13, 237 Pac. 844; *Eagle-Pitcher Lead Co. v. Henryetta Gas Co.*, 112 Okla.

65, 239 Pac. 890, P. U. R. 1926A, 659; *Western Oklahoma Gas & C. Co. v. State*, 113 Okla. 126, 239 Pac. 588, P. U. R. 1926B, 505; *Shaffer Oil & C. Co. v. Creek County Gas Co.*, 114 Okla. 258, 246 Pac. 630, P. U. R. 1926E, 289; *Beauchamp v. Hallett*, 115 Okla. 27, 241 Pac. 161; *Mulendore Gas Co. v. Stillwater*, 120 Okla. 140, 250 Pac. 895, P. U. R. 1927C, 49; *Tulsa v. Oklahoma Nat. Gas Co.*, 123 Okla. 176, 252 Pac. 431; *Kansas, Oklahoma, & C. R. Co. v. State*, 127 Okla. 240, 260 Pac. 468, P. U. R. 1928A, 825; *Hominy Light & C. Co. v. State*, 130 Okla. 258, 267 Pac. 235, P. U. R. 1928D, 743; *Oklahoma Gas & C. Co. v. Grain Exchange Bldg. Co.*, 131 Okla. 205, 268 Pac. 248, P. U. R. 1928D, 574; *Oklahoma Gas & C. Co. v. Wilson*, 146 Okla. 272, 288 Pac. 316.

Pennsylvania. *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260; *Turtle Creek v. Pennsylvania Water Co.*, 243 Pa. 415, 90 Atl. 199; *Mechanicsburg v. Mechanicsburg Gas & C. Co.*, 246 Pa. 232, 92 Atl. 142; *Central Iron & C. Co. v. Harrisburg*, 271 Pa. 340, 114 Atl. 258, P. U. R. 1922D, 687; *Ben Avon v. Ohio Valley Water Co.*, 271 Pa. 346, 114 Atl. 369, P. U. R. 1921E, 471; *Erie v. Public Service Comm. (Pa.)*, 157 Atl. 809, P. U. R. 1932B, 397; *Brookville v. Public Service Comm. (Pa.)*, 160 Atl. 856; *Scranton-Spring Brook Water Service Co. v. Public Service Comm. (Pa.)*, 160 Atl. 230.

Rhode Island. *Bristol v. Bristol & C. Water Works*, 23 R. I. 274, 49 Atl. 974; *Public Utilities Comm. v. East Providence Water Co.*, 48 R. I. 376, 136 Atl. 447, P. U. C. 1927C, 417; *Mount Hope Bridge Co. v. Public Utilities Comm.*, 51 R. I. 218, 153 Atl. 367, P. U. R. 1931C, 57.

South Carolina. *Matheson v. American Tel. & T. Co.*, 137 S. Car. 227, 135 S. E. 306; *State v. Broad River Power Co.*, 157 S. Car. 1, 153 S. E. 537, P. U. R. 1930A, 65.

South Dakota. *Travaillie v. Sioux Falls (S. Dak.)*, 240 N. W. 336.

§ 574. **Monopoly eliminates element of risk.**—That the element of risk is properly and necessarily included in the determination of the proper rate which the municipal public utility should receive for its service is commonplace in business and a well-recognized legal principle. The amount allowed on account of this element, however, is naturally determined by the extent of

Tennessee. McCollum v. Southern Bell Tel. & T. Co. (Tenn.), 43 S. W. (2d) 890, P. U. R. 1932A, 462.

Texas. Chapman v. American Rio Grande Land &c. Co. (Tex.), 271 S. W. 392; West v. Probst (Tex. Civ. App.), 251 S. W. 289, P. U. R. 1923E, 270.

Utah. Logan City v. Public Utilities Comm. (Utah), 296 Pac. 1006, P. U. R. 1931C, 5.

Vermont. West Rutland v. Rutland R. Light &c. Co., 98 Vt. 508, 129 Atl. 303, P. U. R. 1926A, 243.

Virginia. Roanoke Water Works Co. v. Commonwealth, 137 Va. 348, 119 S. E. 268; Portsmouth v. Virginia R. & Power Co., 141 Va. 44, 126 S. E. 366; Hampton v. Newport News &c. R., Gas &c. Co., 144 Va. 29, 131 S. E. 328; Chesapeake & Potomac Tel. Co. v. Commonwealth, 147 Va. 43, 136 S. E. 575, P. U. R. 1927B, 484.

Washington. Puget Sound Elec. R. v. Railroad Commission, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763; State v. Kuykendall, 134 Wash. 620, 236 Pac. 99, P. U. R. 1926A, 103; State v. Department of Public Works, 143 Wash. 67, 254 Pac. 839, P. U. R. 1927C, 781; State v. Denney, 150 Wash. 690, 274 Pac. 791, P. U. R. 1929C, 650; Puget Sound Navigation Co. v. Director of Public Works, 157 Wash. 557, 289 Pac. 1006, P. U. R. 1930E, 289.

West Virginia. Bluefield v. Public Service Comm., 91 W. Va. 442, 113 S. E. 745, P. U. R. 1923A, 678; Charleston v. Public Service Comm., 95 W. Va. 91, 120 S. E. 398, P. U. R. 1924B, 601; Natural Gas Co. v. Public Service Comm., 95 W. Va. 557, 121 S. E. 716, P. U. R. 1924D, 346; Pittsburg &c. Gas Co. v. Public Service Comm., 101 W. Va. 63, 132

S. E. 497, P. U. R. 1926D, 280; Huntington v. Public Service Comm., 101 W. Va. 378, 133 S. E. 144, P. U. R. 1926D, 835; Bluefield Tel. Co. v. Public Service Comm., 102 W. Va. 296, 135 S. E. 833; Elkins v. Public Service Comm., 102 W. Va. 450, 135 S. E. 397, P. U. R. 1927B, 270; Harrisville v. Public Service Comm., 103 W. Va. 526, 138 S. E. 99, P. U. R. 1927E, 11; Charleston v. Public Service Comm. (W. Va.), 159 S. E. 38, P. U. R. 1931E, 74.

Wisconsin. State v. Gosnell, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33; Appleton Water Works Co. v. Railroad Commission, 154 Wis. 121, 142 N. W. 476, 47 L. R. A. (N. S.) 770, Ann. Cas. 1915B, 1160; Waukesha Gas &c. Co. v. Railroad Commission, 181 Wis. 281, 194 N. W. 846, P. U. R. 1923E, 634; Wisconsin-Minnesota Light &c. Co. v. Railroad Commission, 183 Wis. 96, 197 N. W. 359, P. U. R. 1924C, 534; Wisconsin-Minnesota Light &c. Co. v. Railroad Commission, 183 Wis. 104, 197 N. W. 363, 62 A. L. R. 1483, P. U. R. 1924C, 534; Chippewa Power Co. v. Railroad Commission, 188 Wis. 246, 205 N. W. 900; Pabst Corp. v. Milwaukee, 190 Wis. 349, 208 N. W. 493, P. U. R. 1926D, 290; Waukesha Gas &c. Co. v. Railroad Commission, 191 Wis. 565, 211 N. W. 760, P. U. R. 1927B, 545; Pabst Corp. v. Milwaukee, 193 Wis. 522, 213 N. W. 888, 215 N. W. 670, P. U. R. 1928B, 503; J. Greensbaum Tanning Co. v. Railroad Commission, 194 Wis. 634, 217 N. W. 282; Pabst Corp. v. Railroad Commission, 199 Wis. 536, 227 N. W. 18; Wisconsin Hydro-Elec. Co. v. Railroad Commission (Wis.), 243 N. W. 322; Milwaukee v. Railroad Comm. (Wis.), 240 N. W. 165, P. U. R. 1932B, 339.

the risk in the case, and where the business is so well established that it enjoys practically a monopoly of the field, this element of security almost entirely eliminates that of the risk or hazard, for as the court, in the case of *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034, decided in 1909, said: "The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return, without legislative interference, than can be obtained from an investment in government bonds or other perfectly safe security. * * * In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation which, in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply."

§ 575. **Rate increased with element of risk.**—The court, in the case of *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Maine 371, 59 Atl. 537, decided in 1904, recognized this as an element in determining the proper rate and indicated that the rate of return should increase as the element of risk increases, for as the court said: "A public service company may, under some circumstances, be required to perform its service at rates prohibitive of a fair return to its stockholders, considering their property as an investment merely.³ * * * It is true that the fair value of the property used is the basis of calculation as to reasonableness of rates, but, as was pointed out in the *Water-ville* case, 97 Maine 185, 54 Atl. 6, 60 L. R. A. 856, this is not the only element of calculation. There are others; as, for instance, the risks of the incipient enterprise on the one hand, and whether all the property used is reasonably necessary to the service, and whether as a structure it is unreasonably expensive, on the other. * * * An equivalent to the prevailing rate of interest might be a reasonable return, and it might not. It might be too high or it might be too low. It might be reasonable, owing to peculiar hazards or difficulties in one place to receive greater returns

³ *Smyth v. Ames*, 169 U. S. 466, in 171 U. S. 361, 43 L. ed. 197, 18 42 L. ed. 819, 18 Sup. Ct. 418, mod. Sup. Ct. 888.

there than it would in another upon the same investment. Then, their reasonableness relates to both the company and the customer. Rates must be reasonable to both, and, if they can not be to both, they must be to the customer. * * * We understand the purport of this request to be that a public service company can not lawfully charge, in any event, more than the services are reasonably worth to the public as individuals, even if a charge so limited would fail to produce a fair return to the company upon the value of its property or investment. Such, we think, is the law. * * * The company engages in a voluntary enterprise. It is not compelled, at the outset, to enter into the undertaking. It must enter, if at all, subject to the contingencies of the business, and subject to the rule that its rates must not exceed the value of the services rendered to its customers."

§ 576. **Fixed charges and maintenance expenses and dividends.**—That the necessary expenses of maintenance and operation must be met out of the proceeds received from the service of the municipal public utility is an absolute necessity which the courts have never questioned. As the court in the case of *Contra Costa Water Co. v. Oakland, California*, 165 Fed. 518, decided in 1904, said: "The complainant undoubtedly has the right to receive from water rates an income which will enable it to pay its actual operating expenses, its taxes, its interest on its bonded or other indebtedness so far as that indebtedness represents money properly expended in or upon its property, and to pay a reasonable dividend on its stock so far as the stock represents money actually received and so invested, and in addition thereto to receive a sum sufficient to cover the annual depreciation of its plant."

Although ignoring the fact that public utilities are natural monopolies and operate generally with little or no competition, a practical definition of reasonable rates is furnished in the case of *State v. Southwestern Bell Tel. Co.*, 115 Kans. 236, 223 Pac. 771, P. U. R. 1924D, 388, as follows: "A rate that will not permit an adequate return on the value of the property used to produce the service for which the rate is charged, where the user is not required to pay the full value of the service rendered, may safely be said to be unreasonable. A rate that is so high that those who are free to accept the service or refuse it will refuse to take it rather than pay the rate charged may be safely said to be unreasonable. Somewhere between these two extremes lies a reasonable rate. For the purpose of this case, a reasonable rate may be defined as one which provides an ade-

quate return on the value of the property used in producing the service, and which, where patrons may accept or refuse the service, as they choose, is low enough to induce all who desire the service to pay the rate. In this attempt at a definition it has been assumed that the telephone exchanges in controversy have been built where they were needed; that they have been properly constructed; that they have been economically built; and that they have been well managed. * * * There is no field of human endeavor that has more completely depended on scientific investigation for its establishment, or for its continuation and development, than the telephone industry. Every step in that industry, from the raw material to the finished system, is controlled by and performed according to scientific methods. * * * The service rendered by the American Telephone & Telegraph Company is very valuable, how valuable no man can say in dollars and cents. It is almost certain that the Southwestern Bell Telephone Company is getting that service under the agreement much cheaper and better than if that company maintained its own laboratories for scientific research."

That the earnings on the investment must cover fixed charges and maintenance and be sufficient in amount to attract new capital is well expressed by the court in *Elizabethtown Gas Light Co. v. Board of Public Utility Comrs.*, 95 N. J. L. 18, 111 Atl. 729, P. U. R. 1920F, 1001, as follows: "To what extent the increase in prices may be due to an inflation of the currency or to any particular cause we do not know. What we do know is that the dollar of 1919 and the dollar of 1920 is worth less than the dollar of 1916, and still less compared with the dollar of the average year from 1911 to 1916. * * * No allowance seems to have been made for this increase in the rate of interest. It is attempted to justify the scaling down of valuation and return to the gas company, upon the theory that its invested capital was small, but the par value of the stock and the par value of the outstanding bonds by no means measures the investment in a plant that has been built up through sixty years of successful management by reinvesting in the property much of the income and thus increasing the capacity of the prosecutors to render the public service which they were incorporated to render. This suffices to show that the amount of return allowed to the companies would probably be insufficient under present circumstances to attract capital to the business, and this was one of the important tests of the justice and reasonableness of the rate as decided in the *Passaic* case, 87 N. J. L. 705, 95 Atl. 127."

Fixed charges and maintenance expenses must be covered by a rate to make it reasonable, and a classification of rates, based upon the time, purpose, and quantity of service used is permissible, and the cost of readiness to serve is frequently recognized. Although the customer naturally objects to paying for service which he does not use, the fact that the service is made available to him requires an expenditure for equipment in connecting him up with the system for the service, and this is often regarded as a proper item to be covered in the rate. This situation is discussed as follows in the case of *McCormick v. Westchester Lighting Co.* (N. Y. S.), P. U. R. 1931E, 6: "Prior to 1921, there was no statutory authority in this state for 'block rates.' In 1921, the statute was amended to specifically authorize a gas corporation to establish 'classification of service based upon the quantity used, time when used, purpose for which used * * *, and providing schedules of reasonable and graduated rates applicable thereto.' (Public Service Law, section 65, subdivision 5). Subdivision 14, of section 66 empowered the commission to compel gas corporations to establish 'just and reasonable graduated rates and charges.' * * * The act that is forbidden by the statute is the making of a charge where there is no consumption of gas. As I have previously stated, it is, in reality, a prohibition against a charge made because of readiness to serve. That is not the situation here. If the plaintiff does not use any gas, he pays nothing."

A rate which fails to provide sufficient revenue to meet operating expenses, maintenance, and other fixed charges is clearly confiscatory and will be set aside as such, although the company is required to pay an excessive rate for its gas under a contract with another company supplying the same, where there is no relief from such rate and contract-price. This principle is established and applied as follows in the case of *West Ohio Gas Co. v. Public Utilities Comm.*, 42 Fed. (2d) 899, where the court said: "The evidence before the commission and before us is clear, in fact it is not disputed, that the schedules proposed by the commission, the enforcement of which is sought to be enjoined in this proceeding, will not only fail to afford plaintiff with any return upon its investment, but may not even produce revenue enough to pay operating expenses, including reasonable maintenance, provided the service company holds plaintiff to its contract for gas at wholesale, which contract continues in force throughout 1928. * * * It is established that the commission might not base its conclusions upon its files and other gen-

eral information, unless the same were put in evidence in the particular proceeding, and opportunity given to the plaintiff to meet and explain them. * * * For the purposes of this hearing, we may take notice of the extent of territory within the boundaries of the state of Ohio, and generally of the location of important cities and county seats therein; and the acceptable evidence also enlightens us respecting the difficulties to which service corporations are subject in securing gas for distribution at retail to their several localities; wherefrom it is plain that a wholesale rate enjoyed by a service company in one part of the state might not be obtainable by a like company in another section. Factors, such as convenient access to wholesale pipe lines, extent of demand dependent upon number of retail consumers, expense necessary to the particular service company to lay its own lines to wholesale pipe lines, aggregate production of natural gas within the state or introduced from without, available for service throughout the state, and others which readily come to mind, may vitally affect the merits of the particular situation. The commission, as shown by the evidence before us, examined several witnesses on this subject. Their testimony was to the effect that the plaintiff could not, under the circumstances controlling it, have obtained from any available source a better wholesale rate than fifty-five cents; that it was obliged to accept the demand of the service company for that rate with the sole alternative of the construction of an extended line of its own, at a prohibitive outlay, to reach the wholesale service of some other company, whose rates might be lower; that nowhere within reason was there to be found a reasonably available source of supply of surplus gas above that already contracted for by customers of any other wholesale company within the Ohio field. * * * The state of the competent record consequently leaves this court with no other reasonable conclusion than that the plaintiff is bound by its contract with the service company, and that the commission's order requiring it to denounce that contract, and to obtain elsewhere gas at a wholesale rate sufficiently low to enable it to maintain itself with a reasonable return upon its investment, using the schedules directed by the commission, is arbitrary and unreasonable and in violation of the rights conferred upon it by the Constitution of the United States and by law. We do not overlook the hardship suffered by the village, if it is true, that by reason of a practical monopoly the service company is able to and does indirectly force the village to pay a price which, under all the pertinent circumstances, is extortionate; but

the remedy is not to compel the helpless distributor, such as the evidence tends to show the plaintiff to be, to suffer a loss. If the constitutional laws of Ohio will permit, some direct proceeding may require the appropriate wholesaler to furnish gas to the service company at what the commission thinks a reasonable price. If they do not so permit, the remedy must be sought in the legislature."

Where maintenance charges and operating expenses are increased with a corresponding decrease in revenues, because a substantial portion of the more profitable service is being diverted to another utility, the rate of interest necessary to attract capital requires a higher rate of return and a larger charge for the service, as is indicated in the case of *United Railways & Electric Co. v. West*, 280 U. S. 234, 74 L. ed. 390, 50 Sup. Ct. 123, P. U. R. 1930A, 235, where the court said: "Due to the increased use of automobiles, the total number of passengers carried has for some time steadily decreased, while the number carried during the 'rush hours' has increased. This has resulted in an increase of expenses in proportion to the whole number of passengers carried, since equipment, etc., must be maintained and men employed sufficient to care for the increased business of the 'rush hours,' notwithstanding their reduced productivity during the hours of decreased business. Since the war, operating expenses have almost if not quite doubled. The present value of the property used was fixed by the commission at \$75,000,000, and this amount was accepted without question by both parties in the state circuit court and in the court of appeals. Included in this valuation is \$5,000,000 for easements in the streets of Baltimore. * * * A rate of return upon capital invested in street railway lines and other public utilities which might have been proper a few years ago no longer furnishes a safe criterion either for the present or the future. *Lincoln Gas & E. L. Co. v. Lincoln*, 250 U. S. 256, 268, 63 L. ed. 968, 976, 39 Sup. Ct. 454. Nor can a rule be laid down which will apply uniformly to all sorts of utilities. What may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk. * * * It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and

reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties. In this view of the matter, a return of six and twenty-six hundredths per cent is clearly inadequate. In the light of recent decisions of this court and other federal decisions, it is not certain that rates securing a return of seven and one-half per cent or even eight per cent on the value of the property would not be necessary to avoid confiscation. But this we need not decide, since the company itself sought from the commission a rate which it appears would produce a return of about seven and forty-four hundredths per cent, at the same time insisting that such return fell short of being adequate. Upon the present record, we are of opinion that to enforce rates producing less than this would be confiscatory and in violation of the due process clause of the Fourteenth Amendment. * * * The allowance for annual depreciation made by the commission was based upon cost. The court of appeals held that this was erroneous and that it should have been based upon present value. The court's view of the matter was plainly right."

§ 577. **Obsolescence and physical depreciation as operating expenses.**—There are two kinds of depreciation, that due to the ordinary physical wear of operation and that resulting from functional depreciation which results from the necessary replacement of equipment before it is worn out by invention and improved appliances which render more efficient and satisfactory service. The expense of depreciation, whether ordinary and physical or functional, due to the machinery, although not worn out, becoming obsolete by reason of further invention, is equally chargeable to maintenance and the expense of operation, for as the court in the case of *People v. State Board of Tax Comrs.*, 69 Misc. 646, 127 N. Y. S. 825, decided in 1910, in fixing the valuation of a municipal public utility plant for the sake of taxation, said: "As surely as humanity travels to the grave, the machinery and equipment of a public service corporation travel toward the scrap pile. The plant and structures depreciate in less degree, but as certainly. This is ordinary depreciation. But another form of depreciation in the case of properties here being valued takes place. The machinery or equipment, while still capable of years of service, becomes inadequate to do the work demanded—not only by the corporation, but by the law itself.

In the case particularly of electrical machinery, the type becomes obsolete by reason of invention, and increasing public demands frequently require in aid of safe and adequate service that the obsolete appliance or equipment give way to the new. * * * This would appear to be a legislative recognition of the systems adopted providing for the charge, out of income, of items for obsolescence and inadequacy, upon a plan which apparently according to the state was reasonably capable of ascertainment from the experience of the corporation itself. The policy of the state today, so reflected by statute, is in favor of these charges out of earnings. * * * The corporations must provide under the present statute safe and adequate service. Upon this the statute is insistent, and the highest power has been conferred upon the commission to see that this provision of the law is complied with. To provide safe and adequate service is not to maintain old and obsolete cars, even though by constant repair they may be kept from dissolution. It is to keep in touch with the times, and to displace obsolete or inadequate appliances or structures with new and approved appliances. These expenditures come suddenly in some cases—in others their approach may be apprehended."

The same court in the case of *People v. Stevens*, 203 N. Y. 7, 96 N. E. 114, decided in 1911, recognized the same principle in holding that: "A reasonable consideration of the interests of a corporation and the ultimate good of its stock and bondholders, and a regard for the investing public and that fair dealing which should be observed in all business transactions, require that machines and tools paid for and charged to capital account, but which necessarily become obsolete or wholly worn out within a period of years after the same are purchased or installed, should be renewed or replaced by setting aside from time to time an adequate amount in the nature of a sinking fund or that by some other system of financing the corporation put upon the purchasers from the corporation the expense not alone of the daily maintenance of the plant, but a just proportion of the expense of renewing and replacing that part of the plant which, although not daily consumed, must necessarily be practically consumed within a given time. If that is not done, and renewals and replacements are continually added to the capital account, the capital account must necessarily become more and more out of proportion to the real value of the property of the corporation."

An excellent definition and discussion of depreciation and other accounting items to be considered in finding what are reasonable

rates is furnished in the case of *Kansas City Southern R. Co. v. United States*, 231 U. S. 423, 58 L. ed. 296, 24 Sup. Ct. 125, 52 L. R. A. (N. S.) 1: "We are thus brought back to the fundamental distinction between (a) the property or capital accounts, designed to represent the investment of the stockholders, and to show the cost of the property as originally acquired, with subsequent additions and improvements; these assets being balanced by the liabilities, including the amount of the capital stock and of bonded and other indebtedness, with net profit or surplus, whether carried under the head of 'profit and loss' or otherwise; and (b) the operating accounts, designed to show, on the one side, gross receipts or gross earnings for the year, and on the other side, the expenditures involved in producing those gross earnings and in maintaining the property, the balance being the net earnings. Since the regulation of the railroad carrier by the public authority, and especially the fixing of the rates to be charged, depend primarily upon two fundamental considerations, (a) the value of the property that is employed in the public service, and (b) the current cost of carrying on that service, it is clear that the maintenance of a proper line of distinction between property accounts and operating accounts is essential to the execution by the interstate commerce commission of the supervisory and regulatory powers conferred upon it by congress. * * * The contention of the appellant that property originally acquired because necessary in the construction of the road, and afterwards abandoned only because rendered unnecessary by the improvement and development of the property, should remain in the property account as a part of the stockholders' investment, will be found, upon analysis, to rest upon the unwarrantable assumption that all capital expenditures result in permanent accretions to the property of the company. This in effect ignores depreciation,—an inevitable fact which no system of accounts can properly ignore. A more complete depreciation than that which is represented by a part of the original plant that through destruction or obsolescence has actually perished as useful property, it would be difficult to imagine. The fact that the original investment was necessary in order that the second investment might be made is not a conclusive test."

While a reasonable amount is properly chargeable to the depreciation account, this should not be greater than the exigencies require to fairly cover the item. This amount is determined by the difference between the actual physical condition of the

property which is a matter of fact that can best be determined by an actual physical examination of the property, and the value of the property reproduced in its original condition. There is, therefore, no justification for a rate which accumulates a depreciation fund in twice the amount of the actual depreciation experienced in any particular case. This principle is established and fully discussed as follows in the case of Bluefield Tel. Co. v. Public Service Comm., 102 W. Va. 196, 135 S. E. 833, where the court said: "The commission imposed on the company the burden of proof to establish with accuracy and clearness, not merely the value of its property, but the value of what is devoted to public use. Because of its failure to carry this burden, the commission did not feel warranted in placing a greater value on the physical property than \$900,000. It is a fair assumption that a corporation will ordinarily record the correct value of its property on its own books. The books should therefore be considered as offering more dependable evidence of value than the higher estimates of appraisers or witnesses, unless some plausible reason is advanced why the book value is too low. Davis v. Gas Co., P. U. R. 1921B, 342. In this case the appraisers were not called as witnesses. The personnel of the appraisers is not disclosed. The manner in which the appraisal was conducted does not appear. No witness testified that the appraisal value was correct, or explained why the book value was inaccurate. We therefore can not disapprove the action of the commission in adopting the utility's 1913 book value. * * *

In the present case, the commission, being apprised that the monthly operating expense approximates \$17,500, has allowed for supplies \$22,500. We can not say from the evidence that this sum is inadequate. The Gretz estimate of going concern value was entirely conjectural. * * *

It is true that some commissions have fixed going concern value on a percentage basis. The weight of authority, however, has refused to sanction the percentage theory. * * *

The Indiana commission is positive that, 'on account of the different conditions surrounding given utilities, no hard and fast rule can be formulated' as to the determination of going concern value. * * *

We find no uniformity in the rates allowed, but do find uniformity in the view that depreciation depends largely upon the kind of the property and the nature of its use, and that the rate should be determined from a careful inspection of the property. * * *

In the present case the history of this utility shows that it has accumulated in its treasury an amount much greater than the exigencies of the company require. A de-

preciation rate which accumulates and retains a surplus 'beyond the reasonable requirements of the company' should not be foisted upon the patrons of a utility. *City of Meriden v. Light Co.*, P. U. R. 1921B, 611. In the present case the depreciation reserve amounts to practically thirty per cent of the value of the company's property. The decisions oppose the accumulation of such a large reserve. * * * Mr. Gretz was of opinion that the property of the utility was in eighty-five per cent physical condition. If the above rule be applied to this case, the depreciation surplus should be reduced to fifteen per cent of the physical value of the property. * * * Mr. Gretz makes no claim of personal familiarity with the physical property of the company. His recommendations simply represent his personal opinions and theories. But, say counsel for the utility, his evidence is the only evidence in this case on several of the propositions, and therefore it must prevail. Counsel have overlooked the history of the company as presented to the commission. Past performance is far more potent evidence than conjecture. We find that scant heed is ordinarily accorded the mere opinion of the professional expert in rate cases."

§ 578. **Functional and physical depreciation charged to operation not added to capital account.**—The same court in the case of *People v. Woodbury*, 202 N. Y. 619, 96 N. E. 1127, decided in 1910, recognized and gave expression to this principle by saying that: "So long as depreciation of property is a proper factor to take into account in determining the net earnings, I can not see why the rule should not be applied as well to functional as to physical depreciation. In both cases the property becomes valueless, because no longer capable of being applied to the purposes for which it was designed. It would be a false system of accounting which did not take into consideration the destruction of the value of property, from whatever cause, so long as that cause is in constant operation and can be foreseen with reasonable certainty. A loss due to functional depreciation is incurred in the operation of the business, and therefore should be charged as an expense of operation."⁴ * * * Machinery which today is sufficient for its purpose may become scrap iron through the development of inventions, and so pipes and mains sufficient for a system of water supply as it now exists may become valueless through changes in the conditions under which it is used."

⁴ *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148.

While actual, accrued depreciation, which is an established item, should correspond in amount with the annual depreciation reserve account, which is necessarily an estimate and is largely a matter of bookkeeping, this is never true in practice, because estimates do not agree with experience. This element, along with all other items necessary to be considered in fixing a rate base and a reasonable rate for service, is clearly and fully discussed as follows in the case of *State v. Public Service Comm. (Mo.)*, 34 S. W. (2d) 507, P. U. R. 1931B, 448, where the court laid down a comprehensive statement of the rules and principles involved in determining these matters: "The 'fair value' rule, as originally announced in *Smyth v. Ames*, 169 U. S. 466, 546, 547, 18 Sup. Ct. 418, 42 L. ed. 819, requires that consideration be given to (1) original cost of construction; (2) amount expended in permanent improvements; (3) amount and market value of bonds and stock; (4) present cost of construction; (5) probable earning capacity under rates prescribed; and (6) operating expenses. In the same connection it was also made plain that this list of matters for consideration was not intended to be all-inclusive or to exclude other relevant evidence as to value. Later decisions have brought other factors into prominence, such as (7) accrued depreciation (*Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 10, 29 Sup. Ct. 148, 53 L. ed. 371); (8) market value of land (*Minnesota Rate cases*, 230 U. S. 352, 450-456, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18); (9) working capital and (10) going concern value (*McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 412, 414, 47 Sup. Ct. 144, 71 L. ed. 316); and (11) future costs of construction (*Galveston Elec. Co. v. Galveston*, 258 U. S. 388, 397, 398, 42 Sup. Ct. 351, 66 L. ed. 678. * * * While the Supreme Court of the United States has consistently adhered to the principle announced in *Smyth v. Ames*, 169 U. S. 466, 547, 18 Sup. Ct. 418, 42 L. ed. 819, that all matters for consideration are to be given such weight as may be 'just and right' in each case, yet it has never attempted to circumscribe the honest judgment of the regulatory body by hard and fast formulas on the weight to be given any particular character of evidence. All competent evidence must be received and given such weight as under the circumstances of the case is just and right. * * * The evidence amply justified the commission's finding that the company had spread its retirements in the proper manner, and that the property had been efficiently operated. * * * An annual depreciation reserve account differs from actual accrued depre-

ciation, in that the former is an estimate looking to the future while the latter is a determination of what has occurred in the past. If both could be ascertained with absolute accuracy, at the end of the life of the property each would equal the other. In practice they are never the same at any given time during the life of the property. The depreciation reserve is laid up against an estimated impending retirement of property devoted to public service when it no longer efficiently serves that purpose and necessarily implies an available balance, which generally speaking, and in this case, is a matter of bookkeeping and not a sum impounded or turned over to the utility for use without regard to the purpose for which its collection was authorized. Even an excessive accumulated depreciation reserve can not be drawn upon to piece out a rate otherwise confiscatory. * * * Mr. Doyne, testifying for the city, did say that for the past few years there had been a gradual decrease and that 'the trend is gradually coming down,' but the city's Exhibit 9a shows little deviation from a comparative level in construction costs for 1923, 1924, 1925, and 1926. We have also carefully examined the other exhibits above mentioned, and find that, instead of showing a 'decidedly downward' trend in construction costs, they indicate no sharp rises or declines for the last several years shown, and present a comparatively level plateau of prices. It does not appear that the commission failed to make 'an honest and intelligent forecast of probable future values' upon a view of all the relevant circumstances, as required in such cases. *State of Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission*, 262 U. S. 276, 288, 43 Sup. Ct. 544, 67 L. ed. 981, 31 A. L. R. 807. * * * The only evidence offered was by the company, and it tended to support a sum largely in excess of the amount allowed. The city, having conceded the propriety of allowing something for going value, is in no position to complain because the commission finally allowed less than the evidence warranted. *Westinghouse Electric & Mfg. Co. v. Denver Tramway Co.* (D. C.), 3 Fed. (2d) 285, 298. * * * Apart from the company's methods and theories of valuation which were criticized by the commission and the city, and independent of the propriety of the commission's action in treating as nonoperating land certain tracts valued by the company at \$426,411, although conceded to have been in use on January 1, 1927, was the commission's duty to weigh all the competent evidence. We can not say from the record presented that the commission did not properly perform this duty, and the fact that it may have

rejected in part some of the city's estimates does not necessarily impeach the commission's finding. In a question of rate making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing (*Darnell v. Miss. R. R. Comm.*, 244 U. S. 564, 569, 37 Sup. Ct. 701, 61 L. ed. 1311), and in this case there was ample evidence to support the commission's finding. * * * Company witnesses testified that an amount equivalent to two and one-half per cent of the value of the property was necessary for promotion and five per cent for financing. The commission's allowance of \$2,700,000 for promotion and consolidation in its estimate of original cost is thus referred to in its report: 'The original cost of this property contains without doubt some costs incurred in connection with the promotion and consolidation of the properties.' * * * Promotion and consolidation expenses may be allowed in actual cost but not in reproduction cost estimates. * * * Appellant also insists that the commission in its allowance of seventeen and one-half per cent for overhead construction in its estimate of reproduction cost gave sufficient weight to the elements of promotion and consolidation. It is proper, as above stated, to allow for these elements in an estimate of original cost. Furthermore, the city having conceded the propriety of allowing \$2,000,000 therefor in the original cost estimate, will not now be heard to contend that no allowance should be made. * * * From the foregoing it is plain that the company did not charge 'any indirect or overhead, construction costs to the plant,' and the commission's audit by no means included all of them. * * * Many cases might be cited in which courts have held a return of eight per cent to be fair and reasonable. *Brush Electric Company v. Galveston et al.*, 262 U. S. 443, 445, 43 Sup. Ct. 606, 67 L. ed. 1076; *Mobile Gas Company v. Alabama Public Service Comm.* (D. C.), 293 Fed. 208, 221; *Alton Water Company v. Illinois Commerce Comm.* (D. C.), 279 Fed. 869, 873; *New York Tel. Co. v. Prendergast* (D. C.), 300 Fed. 822, 826. In this case the commission estimated that the rate of return would be seven and fourteen hundredths per cent. We are not prepared to say that such rate is unreasonable."

§ 579. **Replacements out of earnings.**—The Supreme Court of the United States has recognized this principle in the case of *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148, decided in 1909, by holding that: "The cost of reproduction is one way of ascertaining the present value of a plant

like that of a water company, but that test would lead to obviously incorrect results if the cost of reproduction is not diminished by the depreciation which has come from age and use.

* * * It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages, with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case. * * * Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning."

That the company is entitled to be reimbursed for losses sustained by inadequate rates, if determined under commission regulation, is decided in the case of *Louisiana Water Co. v. Public Service Comm. of Missouri*, 294 Fed. 954, P. U. R. 1924C, 293,⁵ where the court said: "Moreover, no rate of return can be deemed reasonable which is not high enough to attract capital to the form of investment involved in utility properties and a return of eight per cent upon the fair value of such utility properties has been held to be reasonable. Upon the facts in this case the complainant company, as may be deduced from its schedules of receipts and disbursements, has received practically nothing on account of investment return and depreciation. * * * From the testimony it is evident that the complainant, under the regulation of the defendant commission, has sustained a loss of \$35,036 covering a period of nearly five years. It should be allowed to amortize its losses,⁶ as such losses occurred under the regulation of this commission. The period of recoupment should be as extensive as the period of loss."

To the effect that replacements may be made out of earnings and that "going value" may be considered, but not necessarily as a separate item of valuation, is decided in the case of *Pioneer Tel. & T. Co. v. State*, 64 Okla. 304, 167 Pac. 995, L. R. A. 1918C, 138, where the court said: "In the case at bar, as we have seen, the commission made no deduction from the value of the plant

⁵ Appeal dismissed in 269 U. S. 597, 70 L. ed. 432, 46 Sup. Ct. 120.

⁶ *Galveston Elec. Co. v. Galveston*, Texas, 258 U. S. 388, 66 L. ed. 678, 42 Sup. Ct. 351.

on account of depreciation, but allowed returns upon its value as a going concern, kept up to a high degree of efficiency by replacements paid for out of current revenue. There is no principle of public regulation more firmly established than the right of the company to charge in its rate an amount which will enable it to make these replacements, and as investors put their money into public utilities for the sake of the returns they will be able to obtain, if the allowance for replacements is sufficient to keep up a high degree of efficiency and prevent a lowering of ability of the plant to earn returns, we are unable to perceive the necessity for building up a fund to be used for the purpose of counteracting a purely theoretical depreciation. The theory of the commission seems to be that charges should be made in rates sufficient to counteract or prevent depreciation by replacements, and that when replacements are thus fully provided for, depreciation is counteracted. We see no error in this; at least, none of which the appellant company has any just cause to complain.

* * * In rate-making cases the corporation whose rates are under consideration is always a going concern, and it is inconceivable to think of it in any other light. In such cases the term, 'going concern value,' simply means the value of the plants as a whole upon which the company is entitled to a fair return, as distinguished from its bare physical value. We think there can be no doubt that the corporation commission found and fixed a valuation upon the property of the company as a going concern, as distinguished from its value as a mere naked plant. The commission is not required—indeed, it would not be practical—to set aside a definite sum as a measure of going value."

§ 580. **Expenses due to depreciation not added to capital account.**—That the expense due to depreciation, however, should not be added or charged to the account of capital because it involves the mere replacement of equipment which is concerned with the expense of operation and maintenance, rather than with the permanent investment upon which returns by way of dividends are payable, is the effect of the decision in the case of *Railroad Commission v. Cumberland Tel. & T. Co.*, 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. 357, decided in 1909, where the court said: "It was obligatory upon the complainant to show that no part of the money raised to pay for depreciation was added to capital, upon which a return was to be made to stockholders in the way of dividends for the future. * * * If that were allowable, it would be collecting money to pay for depreciation of the property, and, having collected it, to use it

in another way, upon which the complainant would obtain a return and distribute it to its stockholders. * * * In these cases [gas, water, transportation, etc.], increased profits might be the result of decreased rates. But with telephone companies, as shown by the testimony of the president of the complainant, the reduction in toll rates does not bring an increased demand except upon the condition of corresponding increase in expenses."

In determining annual depreciation to cover the cost of replacing property consumed in operation, the courts sustain the so-called straight-line method, which fixes an even annual charge for this item as operating expense, equal to the service value of the property used up in operation. When a reasonable amount has been allowed for working capital, going value and ordinary fixed charges a return of five per cent will not be sufficient and will be set aside as confiscatory, for as the court said in the case of Michigan Bell Tel. Co. v. O'Dell, 45 Fed. (2d) 180, P. U. R. 1931B, 192: "In determining whether rates prescribed by a state for a public utility are confiscatory, the property, revenues, and expenses of such utility ought to be considered on a state-wide basis. With this conclusion we agree, and the master is in this respect confirmed upon the authority of St. Louis & San Francisco Railway Company v. Gill, 156 U. S. 659, 667, 15 Sup. Ct. 484, 491, 39 L. ed. 567, 573; Puget Sound Traction, Light & Power Company v. Reynolds, 244 U. S. 574, 37 Sup. Ct. 705, 61 L. ed. 1325; New York Telephone Company v. Prendergast (D. C.), 36 Fed. (2d) 54; United Gas Company v. Kentucky Railroad Commission, 278 U. S. 300, 49 Sup. Ct. 150, 73 L. ed. 390.

* * * We agree with the master that it is fundamental that a state statute restricting the right to maintain suits in its courts is not applicable to or binding upon a federal equity court, and that no state procedure can affect a substantive federal right.

* * * The legal effect of the contract between the American Telephone & Telegraph Company and its subsidiaries has already been litigated and adjudicated in the United States Supreme Court adversely to contentions similar to that made by the defendants here. * * * We confirm the master's finding that seven per cent is a rate of return that will avoid confiscation. * * * The master applied the rule deemed by him to be settled by the Supreme Court to the evidence in the present case, giving to the testimony based upon actual inspection the superior probative weight to which it is entitled as compared with testimony based upon theoretical calculation. * * * We think the master in applying the rule that must be controlling

upon us made a proper finding as to accrued depreciation. * * * In determining what amount shall be set up annually as a depreciation reserve to replace property used up in operation, the company uses the so-called 'Straight Line Method.' This method provides for an equal and constant annual charge, representing depreciation or loss of property consumed in operation, to operating expenses, which in the aggregate is equivalent to the service value of the property, or to so much of that value as has expired when the property is retired. * * * The master made an allowance for working capital on the basis of two and forty-eight hundredths per cent of the reproduction cost depreciated of the physical property of the plaintiff. * * * That a reasonable amount of allowance for going value should be considered in determining a rate base is no longer open to question. * * * It will be observed that under the orders of the commission here in controversy the amount available to the plaintiff for return upon the fair value of its property as disclosed by the present record would be very slightly in excess of five per cent. This falls far short of what we consider a fair return, and confirming the report of the master, the defendants' orders in dispute are declared invalid because confiscatory."

§ 581. Competition affects volume and risk of business.—That the rate received for service rendered is properly regulated with reference to the question as to whether the municipal public utility enjoys a monopoly of the business or is obliged to meet competitive conditions is a well-established legal and business principle, for it necessarily affects the volume of the business available to the municipal public utility and also determines the element of risk or uncertainty in the future prospects of the business, for as the court, in the case of *Kennebec Water Dist. v. Waterville*, 97 Maine 185, 54 Atl. 6, 60 L. R. A. 856, decided in 1902, said: "The elemental principles thus far noted may be summarized as, on the one hand, the right of the company to derive a fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses; and, on the other hand, the right of the public to have no more exacted than the services in themselves are worth. * * * And we say that the fact that the company was doing its business without competition may and should be considered by the appraisers when they are valuing the property of the defendant as a going concern. That fact is one of the characteristics of the going business, and may enhance its value.

We are considering now only the legal situation of the company. There is a difference between a franchise which is practically exclusive and one which is actually exclusive, as there is a difference between uncertainty and certainty. The distinction is vital in principle, and it may be important in fixing value."

Freedom from competition and a favorable field for service affects both the volume and the item of risks of the business, which must be considered in fixing the rate for the service. Values determined from reproduction costs, less depreciation, book costs and market value must be considered in determining the rate base. The trend or tendency of prices and values are also material elements in determining this matter. Contracts, making available patent rights and license privileges as well as financing and business experience, constitute additional elements for consideration in such a case for the purpose of determining the proper valuation and rate for service to which the public utility is entitled. These factors, together with the usual elements, which are necessary in determining reasonable rates are fully discussed as follows in the case of *New York Tel. Co. v. Prendergast*, 36 Fed. (2d) 54, P. U. R. 1930B, 33, where the court said: "The master correctly applies these principles as his guide for ascertaining the fair value of the property, used and useful, in furnishing the regulated service, and finding the net return under the rates fixed by the commission. He found the reproduction cost new, less existing depreciation; also the book cost. Reproduction cost, less actual depreciation, is not the legal equivalent of fair value, as the master stated it to be, for it is, as a matter of law, but evidence of value. * * * Reproduction cost, less actual depreciation, is some evidence, the weight of which is to be determined with all the other evidence in the case, as tending to show both the value and the relative importance of all the evidence on the subject. Book costs, with deductions for depreciations, would be an index of present value if there were no fluctuations in the values of land, material, or labor. But there are fluctuations, as this record discloses, and reproduction cost new is an estimate intended to reflect the upward or downward trend in prices or values which have occurred between the date of the actual investment and the date of investigation as to the present value. While the master says he followed the theory of reproduction cost new, less depreciation, or at least gave it controlling weight, nevertheless, the master's results as to present value are correct, except for the modifications which we shall later refer to. Defendants contend that

book cost, less depreciation, should be the sole factor considered in the case at bar. This position assumes the other extreme, and is inconsistent with the authoritative decisions. It is the plaintiff's property of which confiscation is asserted. * * * Undoubtedly the present value is greater than the book cost, less depreciation, and, in any event, it is apparent that, on any valuation which may reasonably be found from these figures, the rates are confiscatory. The master found that the price movement generally was upward, but also found that ninety per cent of the property was purchased or put in service since 1915. He found that the trend in land values was upward, but not very much, except in New York City. This is reflected in the valuation of real estate he accepted for 1926. The effect of the upward trend in prices is properly limited to whether valuations presently made are likely to hold good for a reasonable time in the future. *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 47 Sup. Ct. 144, 71 L. ed. 316. We agree with the master that any trend of upward prices, as disclosed from this record, was ineffectual to change the present fair value of the property devoted to the service. * * * Having found the values at figures which agreed with the cost of reproduction new, less depreciation, the master included nothing for upward trend which he found to exist. No such trend in prices was shown to justify the consideration thereof now urged by the plaintiff. Due regard for upward trend of prices is reflected in the valuations made by the master. * * * Reproduction cost as applied to the land, of necessity, refers to market value. The reproduction cost of the building must be added to the land. The master's valuation of both is not excessive. * * * This apparatus is manufactured under patents, and no other manufacturer, unless licensed, can make it. This plaintiff, whose property necessarily would have to be reproduced on the theory of reproduction cost new, could reproduce the panel type equipment by purchase from the Western Electric Company. Its ability to do so is part of its going value. The master's finding of reproduction cost for this item should be deducted from 1926, that is to say, the item of \$17,392,214, for the so-called 'inexperience factor.' What was charged the plaintiff we must assume the Western Electric Company would charge if the property were to be reproduced. To assume otherwise would be fanciful. There is a claim of excess panel type equipment, and a deduction was made, by the master of sixteen per cent for this item. This is unsatisfactory to both parties, but a careful examination of the record justifies that

deduction. * * * His allowance of \$3,456,000 for preliminary organization and legal fees will be allowed, which includes the sum of \$584,000 allowed for permits for underground construction. * * * The allowance made by the commission for going concern value was soundly based, and therefore we modify the amount allowed by the master to \$10,000,000. * * * There can be confiscation only of the necessary working capital needed to render the service. Board of Public Utility Comrs. v. N. Y. Tel. Co., 271 U. S. 238, 46 Sup. Ct. 363, 70 L. ed. 808. * * * In finding depreciation to be deductible from both the reproduction cost and the book value, the master correctly stated the rule to be that the sum to be deducted must be the actual depreciation. * * * It paid a certain percentage of the gross receipts for services rendered to it by the American Telephone & Telegraph Company; in 1924-1925, four and one-half per cent; 1926, four per cent and 1928, two per cent of the gross receipts. These services consisted of patent protection, legal, commercial accounting, traffic engineering, operating assistance, advice, and telephonic connections with other companies in the Bell System. The contract was made in good faith and carried out. It can not be seriously questioned but that this was all beneficial to the plaintiff. Such assistance made possible the efficient service rendered by the plaintiff. The contract was investigated by the public service commission and won approval. It is an enforceable contract. * * * Accepting these deductions and considering the income as found by the master and stated above, the rate of return on the present fair value as of July 1, 1926, would be less than six per cent; as of July 1, 1928, less than six per cent. Such returns are below the customary rate allowed to public utilities at this time by the courts. * * * This plaintiff is free of competition and has enjoyed an ever-increasing volume of business in a rapidly growing population. The number of telephone users and their use of telephone service, as disclosed by this record, has greatly increased. This monopoly of communication service affords a fruitful field for investment and makes secure investors. Capital's invitation is alluring, and this corporation experienced no difficulty in securing its capital requirements. Indeed, the American Telephone & Telegraph Company, owner of all the capital stock, cared for all such requirements. A seven per cent return will amply assure capital and reward investors. Gas and electric light utilities referred to in the cases above, where returns up to eight per cent were thought not to be high, have no such monopoly and freedom from competition as does this plaintiff."

§ 582. **Monopolies—Rate base—Good will excluded.**—Where the element of monopoly exists, that of good will should not be included, because there is no choice left the customer who must resort to the one source of supply for the service, for as the court, in the case of *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 144 Iowa 426, 120 N. W. 966, 48 L. R. A. (N. S.) 1025, 138 Am. St. 299,⁷ decided in 1909, said: "Save as above indicated, the element of value designated a 'going concern' is but another name for 'good will,' which is not to be taken into account in a case like this, where the company is granted a monopoly."⁸

This same principle is recognized and given expression in the case of *Bristol v. Bristol &c. Waterworks*, 23 R. I. 274, 49 Atl. 974, decided in 1901, where the court said: "The subject of this sale consists of—first, certain material things, the value of which is to be determined by the cost of reproduction, less depreciation; and, second, the right to use them in a certain business, without competition, for a certain time, the value of which right is to be determined by the probable profit of such use. The fact that the plant is a running plant, and the probable retention of customers, which is what is meant by 'good will,' are elements which are included in the valuation of the franchise. A monopoly has no good will, for its customers are retained by compulsion, not by their voluntary choice."

While good will should not be valued where the public utility has a monopoly of the business, the cost of establishing the business and developing it as a going-concern is an element to be taken into account in determining the proper rate base. Where there is no evidence that the price paid for the property was not fair or reasonable, it is proper to consider this item, when shown by the books of the company, along with the tendency of prices and values, as is indicated in the case of *Greencastle Waterworks Co. v. Public Service Comm. of Indiana*, 31 Fed. (2d) 600, P. U. R. 1929D, 287, where the court said: "In fixing utility rates, the defendant commission exercises a legislative function, and not a judicial power. Therefore this court will not review the actions of the commission for the purpose of substituting its judgment for that of the commission. But the function of this court is to determine whether or not the rates as fixed by the commission yield such a small return upon the value of the property as to amount to confiscation and thereby violate the

⁷ Affirmed in 223 U. S. 655, 56 L. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 ed. 594, 32 Sup. Ct. 389.

⁸ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 582, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081.

Constitution of the United States. * * * Interest, calculated upon the amount of money invested from time to time as the work of construction progresses, is a proper charge for rate-making purposes. * * * Organization cost is a proper charge to be considered by the court in fixing the fair value of a utility for rate-making purposes. * * * A reasonable amount is properly allowable for working capital, but the amount as fixed in this appraisal, is unreasonable. The 'cost of financing' has been held to be a proper charge to be considered by the court in fixing the fair value of a utility for rate-making purposes. * * * There is, of course, some value to be attached to its organization as a going concern and the expense that has been incurred in bringing it to its present state. The plaintiff, itself, up to the time the present owners acquired it, had long been carrying upon its books the item of going value at \$14,648, and this court is not justified in fixing for this item a higher value than the plaintiff, itself, has fixed. * * * While it is true that the purchase-price does not necessarily fix the value of a property, yet it is some evidence of value, especially when we consider the fact that this particular property had been offered for sale for many months prior to the purchase thereof. There is no evidence that the price paid was not the fair value, as fixed by the sellers of the stock. * * * The value of the property, as shown by the books of the plaintiff on August 31, 1927, was \$210,584.88, which amount includes going value. This, of course, is evidence which must be considered by the court in arriving at the fair value of said property. However, we must consider the fact, as shown by the evidence, that the price levels since the year 1920 have advanced materially, thus increasing the value of said property. * * * The net amount thus available for return, under the schedule of rates as fixed by the commission in its order of October 6, 1928, is inadequate to yield a reasonable return upon the minimum value of plaintiff's property, as hereinafter found by the court. Having determined that the fair value of the plaintiff's property, as found by the commission, is inadequate, this court, upon all the evidence, finds the fair value of such property to be not less than \$350,000, and that a return of six and one-half per cent upon that amount, after providing for all proper operating expenses, including amortization of the rate case expenses over a period of five years, taxes, and depreciation at the rate of one per cent per annum on the book value of its depreciable property, will not be confiscatory. The rates in issue are confiscatory and in violation of plain-

tiff's rights under the Fourteenth Amendment to the Constitution of the United States. The defendants will therefore be permanently enjoined from enforcing, or attempting to enforce, the order of October 6, 1928."

§ 583. Established business of going concern with fixed income.⁹—That the value of the plant on which a return may be properly expected is enhanced by the fact that the system is a going concern in actual operation is a still further business principle to which the courts have given full effect because the actual value of such a business is naturally and properly enhanced by the fact that it not only represents a fixed property investment, but that it is a practical operating business furnishing service and enjoying the income received for the service. As the court in the case of *Brunswick & T. Water Dist. v. Maine Water Co.*, 99 Maine 371, 59 Atl. 537, decided in 1904, so well expressed it: "We speak sometimes of a going concern value as if it is or could be separate and distinct from structure value—so much for structure and so much for going concern. But this is not an accurate statement. The going concern part of it has no existence except as a characteristic of the structure. If no structure, no going concern. If a structure in use, it is a structure whose value is affected by the fact that it is in use. There is only one value. It is the value of the structure as being used. That is all there is of it."

Going concern value is well defined together with its proper consideration in fixing reasonable rates in the leading case of *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L. R. A. (N. S.) 1, as follows: "The fair return is to be computed on the actual investment, not on the overissue of securities, and the failure to pay dividends to the investors must be due to the causes under consideration, not to an accumulation of a surplus or to expenditures for permanent additions or betterments, which are included in the appraisal of the physical property; in other words, the actual net earnings are to be taken. Making proper allowance for the matters just considered and perhaps for others which do not now occur to me, I define 'going value' for rate purposes as involved in this case to be the amount equal to the deficiency of net earnings below a fair return on the actual investment due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the

⁹ This section (§ 473 of 2d edition) cited in *Garfield Consol. Water Co. v. Public Service Comm.*, 263 Fed. 979.

physical property. * * * Obviously, the most satisfactory method is to show the actual experience of the company, the original investment, its earnings from the start, the time actually required and expenses incurred in building up the business, all expenditures not reflected by the present condition of the physical property, the extent to which bad management or other causes prevented or depleted earnings, and any other facts bearing on the question, keeping in mind that the ultimate fact to be determined is not the amount of the expenditures, but the deficiency in the fair return to the investors due to the causes under consideration."

While going-concern value is properly included in determining the rate base, it need not be set out as a separate item, but may be treated in fixing the value of the plant as an operating whole, and while an average of costs and prices over a period of years or the so-called "trend" theory may be objectionable, where the party itself requests such a valuation, it is binding and not objectionable, as was indicated in the case of *Hardin-Wyandot Lighting Co. v. Public Utilities Commission*, 118 Ohio St. 592, 162 N. E. 262, P. U. R. 1928D, 500, where the court expressed the rule as follows: "The contention is next raised that the commission erred in adopting a valuation made under the so-called 'trend' theory; namely, by taking the values of the commodities used by the utility in its operations and striking an average cost of the prices of such commodities over a given number of years. This objection also is overruled for the reason heretofore given; namely, that the plaintiff in error requested the use of the valuation made upon the trend theory in the former case, and hence has waived its right to insist upon a valuation as of the date of May 1, 1923. However, in this instance the use of the trend system of valuation benefited rather than injured the plaintiff in error. * * * It is self-evident in a rate controversy involving public utility rates charged in a particular municipality that only property used and useful in furnishing service in such municipality should be valued for the purpose of establishing such rate. * * * The plaintiff in error, however, contends that the commission, in addition to using reproduction value less depreciation on the basis of prices higher than those prevailing at the time of the inquiry, should have added thereto a specific allowance for going concern. However, we think that this method of valuation gave due recognition to the fact that the property is a going concern, so far as the making of rates is concerned. * * * The failure of the

court in four of these important cases to make any specific allowance for going value, and its failure in one of these cases to allow for 'cost of establishing the business,' is quite reconcilable with the decision in the McCardle case, 272 U. S. 400, 71 L. ed. 316, 47 Sup. Ct. 144, upon the ground heretofore stated; namely, that the question in the McCardle case was the inadequacy of the price level adopted by the commission for the purposes of its valuation. In the instant case, on the contrary, instead of the price level adopted being too low, it was admitted by the company's engineer that the price basis used was in excess of the cost of reproduction new of the property, less depreciation, based on prices at the time of the rate hearing."

§ 584. **Reproduction cost ignores going concern value.**¹⁰—This principle, together with its application, is well illustrated by the decision of the case of National Waterworks Co. v. Kansas City, Missouri, 62 Fed. 853, 27 L. R. A. 827, decided in 1894, where the court said: "The original cost of the construction can not control, for 'original cost' and 'present value' are not equivalent terms. Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is today. A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city—not only with a capacity to earn, but actually earning—makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction."

The Supreme Court of the United States in its decision of the case of Omaha, Nebraska v. Omaha Water Co., 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. 615, 48 L. R. A. (N. S.) 1084, decided in 1910, expressed this principle forcefully and convincingly in saying that: "The option to purchase excluded any value on ac-

¹⁰ This section (§ 474 of 2d edition) cited in Garfield Consol. Water Co. v. Public Service Comm., 263 Fed. 979.

count of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes, or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers."

That this principle is generally recognized is expressly indicated by the decision in the case of *Pioneer Tel. & T. Co. v. Westenhaver*, 29 Okla. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209, decided in 1911, where the court said: "There is no contention that any value on account of unexpired franchise or for good will should be added to the reproductive value, in order to ascertain the present value; but it is contended that, by reason of the fact that appellant's plant has an established system in operation, has at present customers sufficient in number to pay the operating expenses and annual depreciation and some profit, it has a value beyond the mere cost of reproducing the plant. This element of value contended for has been generally referred to by the authorities as 'the going concern value' or 'going value.' * * * These cases, so far as we have been able to examine them, uniformly hold that, in the absence of a provision in the franchise to the contrary, the going concern element of value must be considered in ascertaining the fair value of the plant."

On this subject the case of *Simpson v. Shepard*, 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, held that: "It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. * * * And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public."

Further the case of *People v. Willcox*, 210 N. Y. 479, 104 N. E. 911, 51 L. R. A. (N. S.) 1, decided March 24, 1914, in a most exhaustive and elucidating opinion maintained that: "It is now generally recognized that 'going value,' as distinct from 'good will,' is to be considered in valuing the property of a public service corporation, either for the purpose of condemnation or rate making but there is a wide divergence of view as to how it is to be considered. The commission in this case says it was taken into account in valuing the plant as a 'going' and not as a 'defunct or static' concern, and that it was also considered in fixing the fair rate of return. * * * The valuation of the physical property was determined by ascertaining the cost of reproduction less accrued depreciation. Preliminary and development expenses prior to operation were included, but no allowance was made for the cost of developing the business. By that method the plant was valued in a sense as a 'going concern.' In other words 'scrap' values were not taken, but to say that that sufficiently allows for 'going value' is the same as to say that 'going value' is not to be taken into account. The problem is to determine what is fair to the public and the company. The public is entitled to be served at reasonable rates, and the company is entitled to a fair return on its investment on the value of the property used by it in the public service. * * * It would have been entitled to a return on the valuation adopted by the commission, if it had no customers, but was just ready to begin business, whereas it had a plant in operation with an established business, which everyone knows, takes time, labor, and money to build up. * * * The opinion of Mr. Justice Clarke * * * saves me the necessity of citing and analyzing the cases bearing on the first branch of the question. We concur fully in what he has said on the subject and in his conclusion that there is no 'logical difference between allowing "going value" in the valuation of a plant when it is to be taken entirely by the public and allowing the same element when valuing the same plant for rate-making purposes. * * * It takes time to put a new enterprise of any magnitude on its feet, after the construction work has been finished. Mistakes of construction have to be corrected. Substitutions have to be made. Economies have to be studied. Experiments have to be made, which sometimes turn out to be useless. An organization has to be perfected. Business has to be solicited and advertised for. In the case of a gas company, gratuitous work has to be done, such as selling appliances at less than a fair profit and demonstrating new

devices to induce consumption of gas and to educate the public up to the maximum point of consumption. None of those things is reflected in the value of the physical property, unless, of course, exchange value be taken, which is not admissible in a rate case. The company starts out with the 'bare bones' of the plant, to borrow Mr. Justice Lurton's phrase in *Omaha Water Works Case*, 218 U. S. 180, 54 L. ed. 991, 30 Sup. Ct. 615, 48 L. R. A. (N. S.) 1084, *supra*. By the expenditure of time, labor, and money, it coordinates those bones into an efficient working organism, and acquires a paying business. The proper and reasonable cost of doing that, whether included in operating expenses or not, is as much a part of the investment of the company as the cost of the physical property. * * * If a deficiency in the fair return in the early years was due to losses or expenditures which were reasonably necessary and proper in developing efficiency and economy of operation and in establishing a business, it should be made up by the returns in later years. If there was a fair return from the start the corporation has received all it was entitled to, irrespective of how much of the earnings may have been diverted to the building up of the business. * * * Three courses seem to be open with respect to rate making, viz.: (1) To charge rates from the start sufficient to make a fair return to the investor and to pay the development expenses from earnings, a course likely to result in prohibitive rates, except under rare and favorable circumstances; (2) to treat the development expenses as a loss to be recouped out of earnings, but to be spread over a number of years, in other words, as a debt to be amortized—that involves complications, but would seem to be fairer to the public, and certainly more practical than the first; (3) to treat the development expenses, whether paid from earnings or not, as a part of the capital account for the purpose of fixing the charge to the public. The last course would seem to be fairest to both the public and the company, as well as the most practical. * * * If the shareholders have been deprived of a fair return on their investment because of the time and expense reasonably and properly required to build up the business, they have, to the extent of that deprivation, added to their original investment and are entitled to a return upon it. If, however, a fair return in addition to the expense of building up the business has been earned from the start, the public, not the shareholders, have paid the development expenses. * * * Of course, a reasonable need for the service from the start and reasonably good management are

assumed. While, with reasonable limits, service may be provided for anticipated needs, a company should not construct a plant in a wilderness and, after a city has been built around it, expect to recoup its losses while waiting, nor should it expect to recoup losses from bad management. I do not include in the latter mere mistakes or errors in judgment which are almost inevitable in the early stages of any business. * * * I define 'going value' for rate purposes as involved in this case to be the amount equal to the deficiency of net earnings below a fair return on the actual investment due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property. * * * Should the public pay more for gas simply because improved pavements have been laid at public expense? It is no answer to say that the new expensive pavements suggest improved conditions which, though adding to the value of the plant, will not, by reason of the greater consumption, add to the expense per thousand feet of the gas consumed. The public are entitled to the benefit of the improved conditions, if thereby the relator is enabled to supply gas at a less rate. The relator is entitled to a fair return on its investment, not on improvements made at public expense. It is said that the mains will have to be relaid. So will the new pavements, and much oftener. Both might possibly be relaid at the same time. The case is not at all parallel to the so-called unearned increment of land. That the company owns. It does not own the pavements, and the laying of them does not add to its investment or increase the cost to it of producing gas."

That enhanced costs of operation and increased fixed charges must be considered in fixing reasonable rates is well expressed in the leading case of *Bluefield Water Works &c. Co. v. Public Service Comm.*, 262 U. S. 679, 67 L. ed. 1176, 43 Sup. Ct. 675, where the court said: "The record clearly shows that the commission, in arriving at its final figure, did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted evidence; and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disregarded. This was erroneous. *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission*, decided May 21, 1923 [262 U. S. 276, ante, 981, 43 Sup. Ct. 544]. Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the

court as to both law and facts. * * * A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally. * * * Under the facts and circumstances indicated by the record, we think that a rate of return of six per cent upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service."

The rule defining what constitutes reasonable rates is well expressed in the case of *Ohio & Colorado Smelting & Co. v. Public Utilities Comm.*, 68 Colo. 137, 187 Pac. 1082, P. U. R. 1920D, 197, as follows: "The unquestioned rule of law is that what the utility company is entitled to demand in the matter of rates, in order that it may have just compensation, is a fair return upon the reasonable value of its property at the time it is being used for the public. Ponder on Public Utilities, section 476. To ascertain such reasonable value for the purpose of fixing rates and in addition to its net earnings, it is the rule of law that there are four different theories for the determination of what constitutes a reasonable value under the facts of any particular case: 'These theories are generally defined by terms which indicate the method of ascertaining what would be a fair return on the reasonable value of the property, and are thus expressed: Original cost; cost of reproduction; outstanding capitalization; and present value. Since the authorities are not agreed as to the proper theory for determining rates nor as to the manner of applying the legal principle established for that purpose, it is impossible that they should agree on what constitutes a reasonable rate in any case or that any decision in any state should control in other states, although the facts of the case may be similar or even identical, because the courts are not agreed as to the proper theory to be applied for the solution of the question.' Ponder, Public Utilities, section 477. * * * That the outstanding capitalization can have but little, if any, relation to the value, as affecting the basis for rates, is the accepted rule of the courts."

While going-concern value is an element to be considered in addition to reproduction costs of the physical property of the plant, the amount depends largely upon the history of the company, which should disclose the amount expended for this purpose, for this is much better evidence than the estimates of experts. If this item has been included and taken care of under the head of operating expense, to that extent at least it should

not be capitalized. In any event the company from its records should produce evidence upon which to base a going-concern valuation. This principle and an interesting discussion of the items, necessary in determining a proper rate base and in fixing a reasonable rate, is furnished in the case of *Charleston v. Public Service Comm.* (W. Va.), 159 S. E. 38, P. U. R. 1931E, 74, as follows: "Nor is it necessary to go into details, because it was improper for the commission to base the valuation of the physical properties exclusively upon reconstruction cost, new, less depreciation. * * * The cost of reproduction new, less depreciation, is to be accepted merely as an element, and not as the standard of value.' * * * We find no warrant in the instant case for ignoring the reports of actual and historical costs, and no reason for giving exclusive or even dominant weight to the evidence of reproduction cost new, less depreciation. The brief of the utility makes the point that, 'no effort was made by the protestants to relate these original book costs to present-day values.' This point is well taken. Without evidence thereon we can not now decide this controversy, and the case must be recommitted to the commission for evidence on that point. * * * It is the settled rule that going-concern value is an element to be considered in arriving at the fair value of utility property. * * * This expression contemplates that commissions will exercise independent judgment in each case, and will not make an allowance for going value, unless justified. 'Whether going-concern value should be considered and allowed at all in determining the base for rate making, and if allowed what the amount of it should be, depends on the financial history of the company.' * * * When, however, a utility has paid the cost of attaching its business, and perfecting its operating organization, that cost, translated into an item of value, should be made a part of the rate base. If the public has paid for that cost through operating expense, the cost should not be capitalized. 2 Wilcox' Whitten, *Valuation of P. S. Co.*, p. 1366. We are of the opinion that the utility assumes the burden of demonstrating to the commission upon direct evidence, when possible, a reasonable groundwork of facts from which going value can be determined. * * * It should show advertisement and solicitation for business, education, and service of the public, an efficient operating organization, and any other fact, from which going value may arise. The opinions of experts, when without foundation of fact, are entitled to little consideration. * * *

As the percentage fixed for going value by the commission is

not substantially supported by the evidence, we set it aside, and advise the commission to take this item under consideration again. * * * We would not have the commission entirely disregard the estimates, but here is evidence of the actual cost of overheads in some of the construction of the utility. This work was done under the highly trained and efficient organization of the utility. The cost was accurately kept and the ratio it bears to the costs of material and labor is much lower than the conjectural ratios of the experts. Consequently, we disapprove the percentages allowed by the commission for this item, and recommend consideration of the evidence of the actual as well as the evidence of the theoretical costs. * * * The utility offered evidence of a market value of its leaseholds of approximately \$50,000,000 which was disregarded entirely by the commission. This was error. * * * The witnesses did not take into consideration the far-reaching effect of this encumbrance, but for rate-making purposes the encumbrance must be considered. * * * Without eminent domain it would seem that the expense of procuring rights-of-way for the utility's pipe lines would have been greatly increased, if not prohibitive. Without pipe lines this gas would have no interstate markets. So the privilege of exercising eminent domain has been a dominant factor in enhancing the value of the leaseholds. That high privilege must now also be considered in favor of the public, against the utility, lest this creation of the public, the utility, become another Frankenstein. * * * In fixing the rate of net return at eight per cent, the commission was largely influenced by its impression that this per cent was required by the Supreme Court. The impression is erroneous. In a number of cases eight per cent has been fixed or approved by the Supreme Court, but it has insisted that the per cent was not arbitrary, and depended entirely upon the circumstances of each case. * * * What is a fair net return must be tested primarily by present economic conditions. This period of financial stress and business depression calls for a conservative allowance; but the return should be ample to assure confidence in the financial soundness of the utility. The return should ordinarily provide a sufficient amount to pay reasonable dividends, and to pass something to the surplus account."

Where going-concern value is not recognized under the theory of reproduction costs, the court will not sustain the position of the commission, because it is now generally agreed that the bare cost of reproduction of the physical property of the plant

is not sufficient. Comparative rates furnish evidence of slight and doubtful value, and while present value is the proper test, cost of cutting pavement and covering mains, which has not been incurred on an estimated theory that they may be, will be discarded, although actual costs for this purpose are properly included under the theory of reproduction cost less depreciation. The necessity of including going value and other items in a valuation which must be current with the fixing of rates is clearly established as follows in the case of Board of Public Utility Comrs. v. Elizabethtown Water Co., 43 Fed. (2d) 478, where the court said: "We hold, as the issue arose with the bill, or, rather, from the order which the bill attacked, that the time at which to compute values is primarily the time of the board's order fixing the alleged confiscatory rates and also the time of the inquiry, * * * when the testimony bears upon that period, rather than the time of entry of the decree which was two years later, during which period many variables as to costs and values inevitably entered in respect to some of which there is no satisfactory testimony. It would be impossible precisely, or approximately, to determine the value of the property at the time of the decree on evidence which was directed, and limited, to values at the time of the order and at various times pending the taking of testimony. * * * Aside from this technical objection, we hold that this doubtful evidence of comparative rates was properly excluded because there was little, if anything, to show that the cities in question were comparable with the municipalities here served or that the operating costs were similar. Ashland Water Company v. Railroad Commission of Wisconsin (D. C.), 7 Fed. (2d) 924; In re Consolidated Gas Company of New York, P. U. R. 1928E, 19, 36. * * * The master took the latter sum. The reason he gave for accepting the testimony for the company was that its witnesses seemed better qualified by experience and familiarity with local land values than the witnesses for the board. However that may be, there is ample evidence to justify his finding and we are inclined, aside from his better opportunity to appraise the testimony by seeing, hearing and judging the qualifications of the witnesses, to the higher figure he adopted. * * * But we can not see how paved covering of mains has added to their 'present' value, though it may add to the cost of repairing them. That cost has not yet been incurred, may never be incurred, or it may be incurred so far in the future that conditions may have changed and the cost decreased or at least changed from what it is today, to be taken

not substantially supported by the evidence, we set it aside, and advise the commission to take this item under consideration again. * * * We would not have the commission entirely disregard the estimates, but here is evidence of the actual cost of overheads in some of the construction of the utility. This work was done under the highly trained and efficient organization of the utility. The cost was accurately kept and the ratio it bears to the costs of material and labor is much lower than the conjectural ratios of the experts. Consequently, we disapprove the percentages allowed by the commission for this item, and recommend consideration of the evidence of the actual as well as the evidence of the theoretical costs. * * * The utility offered evidence of a market value of its leaseholds of approximately \$50,000,000 which was disregarded entirely by the commission. This was error. * * * The witnesses did not take into consideration the far-reaching effect of this encumbrance, but for rate-making purposes the encumbrance must be considered. * * * Without eminent domain it would seem that the expense of procuring rights-of-way for the utility's pipe lines would have been greatly increased, if not prohibitive. Without pipe lines this gas would have no interstate markets. So the privilege of exercising eminent domain has been a dominant factor in enhancing the value of the leaseholds. That high privilege must now also be considered in favor of the public, against the utility, lest this creation of the public, the utility, become another Frankenstein. * * * In fixing the rate of net return at eight per cent, the commission was largely influenced by its impression that this per cent was required by the Supreme Court. The impression is erroneous. In a number of cases eight per cent has been fixed or approved by the Supreme Court, but it has insisted that the per cent was not arbitrary, and depended entirely upon the circumstances of each case. * * * What is a fair net return must be tested primarily by present economic conditions. This period of financial stress and business depression calls for a conservative allowance; but the return should be ample to assure confidence in the financial soundness of the utility. The return should ordinarily provide a sufficient amount to pay reasonable dividends, and to pass something to the surplus account."

Where going-concern value is not recognized under the theory of reproduction costs, the court will not sustain the position of the commission, because it is now generally agreed that the bare cost of reproduction of the physical property of the plant

is not sufficient. Comparative rates furnish evidence of slight and doubtful value, and while present value is the proper test, cost of cutting pavement and covering mains, which has not been incurred on an estimated theory that they may be, will be discarded, although actual costs for this purpose are properly included under the theory of reproduction cost less depreciation. The necessity of including going value and other items in a valuation which must be current with the fixing of rates is clearly established as follows in the case of Board of Public Utility Comrs. v. Elizabethtown Water Co., 43 Fed. (2d) 478, where the court said: "We hold, as the issue arose with the bill, or, rather, from the order which the bill attacked, that the time at which to compute values is primarily the time of the board's order fixing the alleged confiscatory rates and also the time of the inquiry, * * * when the testimony bears upon that period, rather than the time of entry of the decree which was two years later, during which period many variables as to costs and values inevitably entered in respect to some of which there is no satisfactory testimony. It would be impossible precisely, or approximately, to determine the value of the property at the time of the decree on evidence which was directed, and limited, to values at the time of the order and at various times pending the taking of testimony. * * * Aside from this technical objection, we hold that this doubtful evidence of comparative rates was properly excluded because there was little, if anything, to show that the cities in question were comparable with the municipalities here served or that the operating costs were similar. *Ashland Water Company v. Railroad Commission of Wisconsin* (D. C.), 7 Fed. (2d) 924; *In re Consolidated Gas Company of New York*, P. U. R. 1928E, 19, 36. * * * The master took the latter sum. The reason he gave for accepting the testimony for the company was that its witnesses seemed better qualified by experience and familiarity with local land values than the witnesses for the board. However that may be, there is ample evidence to justify his finding and we are inclined, aside from his better opportunity to appraise the testimony by seeing, hearing and judging the qualifications of the witnesses, to the higher figure he adopted. * * * But we can not see how paved covering of mains has added to their 'present' value, though it may add to the cost of repairing them. That cost has not yet been incurred, may never be incurred, or it may be incurred so far in the future that conditions may have changed and the cost decreased or at least changed from what it is today, to be taken

care of by a corresponding change of rates. It seems unfair to estimate and add the present cost of repairs, not made, as an element in ascertaining present value of property for rate-making purposes. That would subject people who improve their streets to the penalty of paying higher water rates for all time.

* * * But the board here contended that the company owns neither water nor water rights, and that what it has is at most a franchise. It owns lands with percolating or migratory water beneath it which, by permission of its charter, it has tapped by wells. Having been accorded full value for its land the board contended it was not entitled to an added value for water, under the New Jersey law. We find the question difficult to solve. * * * If excluded from the rate base as in the master's calculation, still the rates imposed by the board will not yield the return it allows; and neither will the rates filed by the company. * * * Following the value of easements the master added the stipulated sum of \$36,197 for cost of paving actually cut at reproduction cost depreciated, making a total value for tangible property of \$6,466,642.50. Then follow values of three intangibles: First, allowance for overhead at seventeen per cent, or \$1,099,329. That some allowance should be made is evidenced by the concession of the board in this regard. It complains that only fifteen per cent was allowed in *Middlesex and Plainfield-Union Water cases*, (D. C.), 10 Fed. (2d) 519; (D. C.), 30 Fed. (2d) 846. The board has not convinced us that the allowance is excessive. Second, allowance as a going concern of ten per cent, or \$756,597. The board allowed nothing. To say that this property has no additional value as a going concern over the bare cost of reproduction of its physical property does not accord with the evidence, nor does it follow the trend of such cases where value as a going concern is recognized and, when proved, is included."

§ 585. **Present value basis for determining reasonable rate.**
—That the present value of the property is the proper basis on which to determine what constitutes a reasonable rate is well expressed in *Mobile Gas Co. v. Patterson*, 293 Fed. 208, P. U. R. 1924B, 644: "When the property of a citizen is subjected to the public use at a particular time, the owner is entitled to be compensated upon the basis of the value of the property at the time it is subjected to the public use, and that, if this value is arrived at by an inquiry as to its value at a former date, it is essential that there should be added thereto the increase in value since that time by reason of rising markets. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. ed. 382, 48 L. R.

A. (N. S.) 1134, 15 Ann. Cas. 1034; Potomac Elec. P. Co. v. P. U. Comm., 51 App. D. C. 77, 276 Fed. 327. * * * In all cases the question to be solved is the present reasonable value of the property. The present reasonable market value is the test which is ordinarily adopted; but where there is no established reasonable market value for any reason, the court must resort to such other methods of arriving at a just conclusion as may be available; and in determining this question much, little, or no light may be obtained from an inquiry as to what the owner actually paid for the property, according to circumstances."

On appeal of this case, the Supreme Court in *Patterson v. Mobile Gas Co.*, 271 U. S. 131, 70 L. ed. 870, 46 Sup. Ct. 445, while affirming the decision on its merits as to the rate being confiscatory, modified the decree of the court below as to future valuations, and said: "While within his powers as the law then stood, the district judge went very far when he entirely disregarded the views of the circuit judges who sat on the specially constituted court. The statute was materially changed by the Act of February 13, 1925, ch. 229, 43 Stat. at L. 936, 938, and now causes like this must be finally adjudicated by a court composed of three judges. To such a court we think the questions to which those portions of the decree relate ought to go before we undertake finally to pass upon them. The approved portion of the decree will protect the company against immediate danger of serious injury; and if hereafter its rights are threatened by further unlawful interference application for relief may be made to the proper specially constituted district court. With the indicated modification the decree below is affirmed."

To a similar effect the rule for determining reasonable rates is well expressed in the case of *Minneapolis, Minnesota v. Rand*, 285 Fed. 818, as follows: "The claim that past profits justify a present rate that is not reasonable is no more tenable than the converse contention that if a public service corporation has operated at a loss in prior years, it is therefore entitled to more than a reasonable present rate of return in order to make up for the past deficits. * * * In valuations of public utilities, there has been some doubt expressed by the courts and commissions having the duty in charge, as to what importance is to be given to prices as affected by the conditions resulting from the war, as may be seen in a review of many cases in a note to *Petersburg Gas Co. v. City of Petersburg*, 132 Va. 82, 110 S. E. 533, 20 A. L. R. 542, 589; but the rule established by the decisions of the Supreme Court of the United States, which have been cited is that

the fair value at the time in question must be taken, and this rule has been applied, although the war and its results have advanced prices far beyond the ordinary prices existing before the war.

* * * The gas company is entitled to the fair value of its property, even though that value has been increased as a result of the war, just as the laborer, the merchant, the manufacturer, the owner of land, and the lender of money may require the prevailing prices for what they furnish."

CHAPTER 24

VALUATION OF THE INVESTMENT

Section	Section
590. Basis for fixing rates and purchase-price.	602. Present value as a going concern.
591. Fair return on reasonable value of necessary property.	603. Market valuation or capitalization inaccurate.
592. Four theories for ascertaining valuation.	604. Present actual physical valuation as going concern.
593. Original cost if not excessive.	605. Franchise valuation.
594. Reproduction less depreciation.	606. Valuation limited to property being used for public.
595. Capitalization and investment distinguished.	607. Rate presumed reasonable—Effect of reduction on income.
596. Power and necessity of controlling capitalization.	608. Elements of valuation as evidence of true value.
597. Connection between capitalization and investment.	609. Current market price and rate of interest.
598. Tendency to regulate issue of stocks and bonds.	610. Net earnings rule.
599. Present value true test.	611. Limitations and additions necessary to this rule.
600. Theories of valuation considered.	612. No constitutional right to unreasonable return.
601. Valuation as of the time question determined.	

§ 590. **Basis for fixing rates and purchase-price.**—The determination of the reasonable value of its property at the time it is being used for the public, upon which the municipal public utility is entitled to a fair return, is the ultimate and most difficult question. This is the rate base used in fixing the rates which the municipal public utility may receive for its service and is the amount to which it is entitled in the case of its purchase by the municipal corporation in the exercise of its right of eminent domain or of its option or contract to purchase which is commonly stipulated for in the special franchise or contract granting consent to the use of its streets for the purpose of installing and operating the municipal public utility and providing service to the municipality and its inhabitants.

§ 591. **Fair return on reasonable value of necessary property.**¹—The well-established rule of law is unquestioned that "what

¹ This section (§ 476 of second edition) cited in *Ohio & Colorado Smelting &c. Co. v. Public Utilities Comm.*, 68 Colo. 137, 137 Pac. 1082, P. U. R. 1920D, 197.

the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."²

The determination of the proper basis for ascertaining the reasonable value of the property used and useful in rendering its service is the final and most difficult matter for solution in the complex and as yet not fully developed field of the law of municipal public utilities. The later decisions continue to emphasize present value as the proper rule of valuation, supplemented by proper depreciation and other fixed operating costs in order to determine the proper rate base. The suggestion of prudent investments is discussed and disposed of in the case of *Southern Bell Tel. & T. Co. v. Railroad Comm. of South Carolina*, 5 Fed. (2d) 77, P. U. R. 1926A, 6, where the court said that: "There is much to be said for the adoption of capital honestly and prudently invested as the basis. The reasons for the adoption of this basis and the difficulties attending the application of the present value rule are strongly set forth in the dissenting opinion of Mr. Justice Brandeis (concurring in by Mr. Justice Holmes) in *State of Missouri ex rel. Southwestern Telegraph Co. v. Public Service Commission of Missouri*, 262 U. S. 276, 289, 43 Sup. Ct. 544, 67 L. ed. 981, 31 A. L. R. 807; but the majority of the court were of the contrary opinion. In none of the line of cases beginning with *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418, decided in 1898, and ending with *Ohio Utilities Co. v. Public Utilities Commission of Ohio*, 45 Sup. Ct. 259, 69 L. ed. 656, decided March 2, 1925, did the Supreme Court adopt the rule of capital honestly and prudently invested as a rate basis, but, on the contrary, held to the rule of value at the time of the inquiry as the correct basis."

§ 592. **Four theories for ascertaining valuation.**³—This general legal principle is as firmly established and fully accepted as the results of its practical application are uncertain and difficult of solution in determining what specific rate should be fixed in the particular case. In addition to the "prudent investment" theory and the net earnings rule, there are four different theories for the determination of what constitutes a reasonable rate under the facts of any particular case. These theories are gener-

² *San Diego Land &c. Co. v. National City, California*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804. *Public Utilities Comm.*, 59 Utah 191, 203 Pac. 627, and quoted in *Ohio & Colorado Smelting &c. Co. v. Public Service Comm.*, 68 Colo. 137, 137

³ This section (§ 477 of second edition) cited in *Utah Copper Co. v. Public Utilities Comm.*, 59 Utah 191, 203 Pac. 627, and quoted in *Ohio & Colorado Smelting &c. Co. v. Public Service Comm.*, 68 Colo. 137, 137 Pac. 1082, P. U. R. 1920D, 197.

ally defined by terms which indicate the method of ascertaining what would be a fair return on the reasonable value of the property, and are thus expressed—original cost; cost of reproduction; outstanding capitalization; and present value. Since the authorities are not agreed as to the proper theory for determining rates nor as to the manner of applying the legal principles established for that purpose, it is impossible that they should agree on what constitutes a reasonable rate in any particular case or that a decision in any state should appeal or prove acceptable in other states, although the facts of the case may be similar or even identical.

§ 593. **Original cost if not excessive.**—The application of the theory of original cost is attended with many practical difficulties, for in attempting to ascertain the actual original cost in many cases the records available on this point are neither accurate nor complete. The solution of the further question under this theory of original cost, which is naturally attended with difficulty, is the determination of the honesty and necessity of such expenditures and whether the contract-price as paid was exorbitant or fraudulent, for in many cases the contractor has been paid in part at least in stocks and bonds of the municipal public utility on a valuation which was far from par and probably no nearer their actual value at the time of their issue and acceptance by the contractor. As the application of this theory necessarily contemplates a determination of what was the actual and fair original cost, it could not be followed in a case where the capacity of the plant was unreasonably excessive or the amount which had been expended in its equipment or for a site was much greater than necessary “prudently” to invest in order to provide the required service, for such excess could not be fairly included in determining the proper valuation as the basis for fixing a reasonable rate for the service at the time, although in anticipation of increased demands for its service the municipal public utility is entitled to provide reasonable additional capacity over the actual present demands of its service in order to anticipate the additional future demands and thus avoid the expense of increasing its capacity to furnish the additional service by rebuilding or materially extending its plant.

While original costs are only evidence of present value they are more acceptable than the estimates of experts. This theory of determining rate bases must necessarily be supplemented by the reproduction theory. These principles and their application are clearly discussed as follows in the case of Boise Artesian

Water Co. v. Public Utilities Comm., 40 Idaho 690, 236 Pac. 525, P. U. R. 1926A, 195, where the court said: "A study of the record will convince one that the engineer who prepared the report was more than willing to disregard actual records of the company and substitute his estimates. The company's reproduction cost estimate is what its title indicates. * * * To say that the value of the property of a utility is to be determined solely by subtracting depreciation from what the property originally cost would not be fair either to the utility or to the public. The property may have cost too much. It may have been purchased at an inflated value. On the other hand, it may be too low a value in view of the advance in prices. By some the theory has been advanced that value should be determined from outstanding stocks and bonds, and such a method might be proper in some cases, but, in view of the fact that little restriction has heretofore been generally exercised to prevent the issue of 'watered stock,' it would be eminently unfair to require users to pay a return on value based solely on outstanding stocks and bonds. * * * Practically, and from an administrative standpoint, the valuation of the property of a utility, for rate-making purposes, must be more or less permanent, and can not be raised or lowered in accordance with the ephemeral rise and fall of prices and values. * * * Of course, it should be borne in mind that value, as here used, does not strictly mean market value or sale value; for the value of the property of a utility for rate-making purposes must be measured somewhat by the use to which it is devoted. * * * We therefore lay it down as our view that, in valuing the property of a utility, the commission should require evidence relating to the cost of reproduction or replacement, actual cost, depreciation, earning capacity, present service condition, investment, the service furnished, and any and all other relevant evidence, so that its final judgment will be based on evidence bearing on cost and value in all their phases and relations, and the value found to exist will be determined from a careful consideration of all relevant facts, conditions, and circumstances. * * * It is apparent, from a study of its order, that the commission failed to give sufficient or proper consideration to reproduction cost in determining the value of the property of the company. * * * From what has been said it follows that it is our conclusion that in giving the property installed prior to 1917 a value according to 'price levels averaged over the period of from 1913 to 1916, inclusive, * * *' and 'allowing the reasonable and prudent investment for property in-

stalled in 1917 and thereafter (prior to the hearing), measured by the actual amount required, the commission was in error. The company was entitled to have its property given its then present value. * * * Whatever powers or functions may be possessed by the owners or managers of a utility, which may not be interfered with by a commission, users can not be required to pay a return on property which the commission has found on sufficient evidence is nonoperative. To hold otherwise would make a farce of utility regulation. * * * The city concedes that such a value is inherent in a utility property, and that, while an allowance for overheads should be made in fixing a value for condemnation, none should be made in fixing a value for rate making. The distinction does not appeal to us. In both situations it is the property of the company with respect to which a value is to be determined. * * * In arriving at the value of the property of a public utility, it is proper to include as an element thereof a sum for interest during construction. * * * There does not appear to be any well-defined rule by which the amount necessary for working capital can be ascertained. The requirements differ with different utilities. The amount that should be required for the working capital of a utility is peculiarly within the province of the commission. * * * Because of the condition of this water system, as found by the commission, we believe it has an additional value because of the fact that it is a successful going concern. * * * The value of the franchise is not necessarily determined by its cost. In view of the evidence, considered as an expense of business development, we are of the opinion that the allowance by the commission of practically one-half of the amount spent for attorneys' fees in the litigation is sufficient."

§ 594. **Reproduction less depreciation.**—The adoption of the theory of reproduction is attended with practically all the difficulties of that of original cost, and the application of either must be attended with a reduction of the amount of the depreciation which the plant has sustained, except so far as its parts may have been repaired or replaced; nor does the theory of the original cost or the cost of reproduction take into account a valuation of the plant as a going concern with an established income. This element of value is generally accepted and is to be added to original or reproduction costs.

The right of the public utility to recover the capital investment as functional depreciation or obsolescence, when the property is totally used up or fully replaced, is limited to the original

capital investment and may not include increased values, found under a reproduction theory, for as the court said in the case of Hominy Light & Gas Co. v. State, 130 Okla. 258, 267 Pac. 235, P. U. R. 1928D, 743: "Considering the record as a whole, we are of the opinion and find the valuation of the properties as fixed by the corporation commission for rate-base purpose a fair and reasonable one, and that the record does not justify our increasing the same. * * * It is contended by plaintiff that the five per cent interest allowed is insufficient to cover depletion or amortization, it being asserted the life of the investment and use of the property is approximately twenty years; that the company was entitled to a sufficient rate on its investment to insure a total return of such investment, less the sale value of the property at the end of its present use. The right of the stockholders or company to earn such sum as would reimburse the investor for the original capital investment at the termination of the business is universally recognized, was so recognized by this court in the case of Oklahoma Natural Gas Co. v. Corporation Commission, 90 Okla. 84, 216 Pac. 917, supra, and, as we consider, recognized by the commission in the present case. It will be observed that the right of recovery is limited to the original capital investment which would not include a marked increase in value over the actual capital invested. * * * Plaintiff companies in the instant case have declared at different times considerable liberal dividends, which fact must be taken into consideration in determining the rate on original investment. As to whether the life of the company or its operations will be limited to twenty years, by reason of exhaustion of natural gas supplies, is problematical and uncertain. At the time of hearing, the distributing company had been operating approximately ten years. * * * 'On appeal from an order of the corporation commission fixing a rate to be charged by a gas company, if there is any evidence reasonably to support the order of the commission, the prima facie presumption of the order's being reasonable, just, and correct obtains by reason of section 22, article 9, of the Constitution, and the burden is upon appellant to overcome that presumption.'"

The effect of the application of the theory of reproduction less depreciation, supplemented by actual costs and the present financial standing of the company, is furnished in the case of Chesapeake & Potomac Tel. Co. v. Whitman, 3 Fed. (2d) 938, where the court said: "Usually the law assumes that, at any particular time, a thing is worth what it will then fetch in the open

market. * * * In the nature of things, there can be seldom anything like a free market for a public utility. Except in the case of some comparatively small properties, possible purchasers are few, and probable ones perhaps nonexistent. This was true, even before the days of public regulation and limitation of rates. In that earlier time the prices commanded in the market by the stocks and bonds of such a corporation might be a fairly accurate measure of the then value of its properties. Nowadays what a public utility's securities will sell for may be largely, if not altogether, dependent upon what rate the state will permit it to charge, and in consequence may have small relation to the actual worth of its property used in the public service. In the instant case the great bulk of the company's securities have never been bought or sold in any genuine sense of that term. Its entire common capital stock was apparently originally subscribed for by the corporation which still holds it. * * * In the case before us, no evidence has been offered to prove what its property, or the securities by which it is represented, would fetch, if put up for sale. Another way of ascertaining what is the present fair value of what is used to show what would be the cost of reproduction of so much of it as is really used and is useful. * * * The reproduction cost would, of course, exceed the present value by whatever difference there is between that which is altogether new and that which is in varying degree now old. * * * In those pre-war days, the company did not think that such a way of ascertaining the amount upon which it was entitled to a return was fair. The commission seems to have felt the company was right to a degree at least, and it therefore did not accept the reproduction figures as conclusive. * * * Books so kept would show the cost of the company's property at any particular time. In the absence of great changes in values, such cost, due allowances being made for depreciation, would be a fairly accurate measure of present value. * * * To this it added \$975,000 for working capital, and \$705,000 as the worth of the company's intangible property; that is to say, 'Going-concern value,' 'cost of attaching business,' or whatever other title you may choose to give to it. * * * To this \$32,259,575 must be added the sum of \$975,000, which the commission finds to be the sum used by the company as working capital. * * * The property acquired before 1917 is now worth, upon the assumption of the accuracy of the index figures and of the way in which they have been used, almost \$7,300,000 more than it cost the company. * * * The present value,

less depreciation, arrived at by these gentlemen, of \$42,841,110 and \$38,315,153, is comparable with the \$29,507,949 which, as will be subsequently shown, is the difference between what the company has invested in its present property, expressing that investment in dollars of today. * * * Each of them takes into account what one of them calls 'cost of establishing business' and the other 'going value.' Their estimates on this score are many times as great as any amount which the company expended for that purpose. * * * We do not see that the company has succeeded in sustaining the burden resting upon it to show that its property today is worth more than it cost in dollars of 1923, plus such allowance as the commission has made it for the value not recorded on its books, but, nevertheless, present in its well-organized and highly efficient operating concern. * * * Nevertheless we take it to be clear that to deny to a utility the opportunity constantly to add to the value of its property out of the rates paid by the public is not confiscation. If the present company stood alone, either in the sense that it had, unaided, to look after its own financing, or that it did not form what is in reality an integral part of a nation-wide system we might well doubt whether a return of six per cent would be sufficient to enable it to raise the money necessary to its growth, and therefore, it may be, to its life; but such is not the case. It is owned and altogether controlled by the American Telephone & Telegraph Company, hereinafter styled the National Company. In partial return for a substantial annual sum paid by it to the National Company, the latter has agreed to assist it in its financing. According to the table submitted on its behalf, its net earnings have almost always fallen somewhat short of six per cent, and yet it has not only lived, but it has been able to raise many millions for the expansion of its facilities and the promotion of its business. * * * By these cases it is settled that, in the absence of some showing of bad faith, such contracts are binding upon local telephone companies, and must be respected by commissions and courts, provided that the company clearly shows that the charge made and allowed for the services rendered and supplies furnished was reasonable, and less than that at which the same could be obtained from other sources. * * * The law wisely makes the findings of the commission presumptively correct. We have differed with them, in so far as we have, with regret, and only because we are compelled to do so by our understanding of the facts and the law. We are fully in accord with its view that the telephone rates

should not be raised, unless and until the necessity for so doing is clearly demonstrated. It is the great glory of the privately owned telephone system of this country that the charges at which its facilities have been furnished have, in the past, been such that so large a proportion of our people have been able to make generous use of them. The maintenance of such conditions is of moment to all of us, and not the least to the telephone companies themselves."

Where the relation between the company and its consumers is strained because of the unsatisfactory service furnished and there is evidence of a competitive service entering the field, the element of going value is practically eliminated. This principle is discussed as follows in the case of *Clarke v. Hot Springs Electric Light & Co.*, 55 Fed. (2d) 612: "There was considerable evidence to the effect that the plant had very little value; that the relations between the company and the consuming public were strained, and that the town council were dissatisfied with the service and had given a new franchise to Ireland. All of these things had a bearing on the value of the property. The testimony of the experts is so divergent in nearly all its angles that it is practically impossible to reconcile. * * * After examining the evidence, we are of the opinion that the value found by the trial court was fair and reasonable."

§ 595. **Capitalization and investment distinguished.**⁴—The theory of outstanding capitalization is not satisfactory because experience has shown that in many cases it has very little, if any, relation to the actual value of the investment. Fortunately for the consumer, the courts are practically agreed that the outstanding capitalization or the amount of stock and bonds issued is neither a fair test of the capital actually invested in the business nor a reliable measure by which to estimate the reasonable value of the property used and useful in rendering the service; and many cases have expressly stated that there is little if any logical connection between the actual value of the investment and the par or even market value of the stock and bonds issued by the company, which the courts have said only constitute evidence of the history of the development of the business and are valuable chiefly for that purpose. However, this is now subject to the regulation and control of public utility commissions.

⁴ This section (§ 480 of second edition) quoted in full in *Ohio & Colorado Smelting & Co. v. Public*

Utilities Comm., 68 Colo. 137, 187 Pac. 1082, P. U. R. 1920D, 197.

§ 596. Power and necessity of controlling capitalization.—

The state which creates the municipal public utility and supervises its operation directly or through its agency, the city or commission, unquestionably should have the power to regulate and control the issue of its stock, bonds and other liabilities upon which a fair return for the service rendered may properly be expected. This matter is so easily controlled in the hands of the state that its flagrant abuse in so many cases in former times by the issue of almost unlimited quantities of watered stock is as difficult to understand as it is now easy to correct or prevent. That the state has this power is beyond question, and while some of the courts may seem inclined to sustain a rate which will permit of a return on such stock after it has been issued and purchased by third parties, there can be no question as to the opportunity or the duty of the state to prevent its issue in the first instance in the interest and for the protection of the public which pays for the service as well as purchases the securities.

§ 597. Connection between capitalization and investment.—

It is the reasonable value of the property which is being used for the public in rendering the service upon which the municipal public utility is entitled to a fair return, so that the capitalization or the amount of stock and bonds outstanding is not the proper basis for fixing the rate, for formerly in many cases it was not even a fair criterion of the actual investment necessary to render the service. Indeed, so great was the discrepancy between capitalization and actual value in such cases that there seems to have been no logical connection between the two; nor does a rate which fails to give a reasonable return upon all the outstanding stock and bonds of the municipal public utility, so far as such capitalization exceeds the actual value of the investment, constitute a taking of property without due process, nor does it amount to confiscation because it is the real and not the nominal paper valuation that determines the amount of the investment upon which the municipal public utility is entitled to a return. The purpose and effect of an inflated capitalization in practice, however, is obvious because of the fact that it often received full recognition in fixing the rate, and so long as this was the case it furnished the necessary motive for the reorganization of municipal public utilities and their consolidation as well as for the organization of holding companies, and such legal formalities as present practical opportunity for increasing the apparent investment by multiplying and supplementing the capitalization as evidenced by the aggregate amount of stock

and bond issues for which these legal formalities furnish the occasion.

§ 598. **Tendency to regulate issue of stocks and bonds.**—There is an increasing tendency, however, to regulate the issue of stocks and bonds and many of the states have clearly demonstrated that it is a simple matter indeed to prevent the issue of more stock or the creation of a greater bonded indebtedness than the value represented by it and received for it. When capitalization is an accurate measure for the valuation of the investment of a municipal public utility, the matter of its regulation is much simplified and the determination of the proper rate base for the service rendered is greatly aided. The issue of securities by holding companies, however, still obtains and in some cases seems to furnish the chief motive for their existence. Where, however, the relation and issues are real rather than nominal they may be fully justifiable.

An interesting discussion of the effect of a low dividend liability on outstanding bond issues in fixing a reasonable rate on the valuation of a public utility is found in the case of *West v. United R. & Electric Co. (Md.)*, 142 Atl. 870, as follows: "Nor is there any rule by which we may precisely determine what is the actual value to the public of such service as that which the company sells. When the company speaks of a 'return of not less than eight per cent' on its property, it must be remembered that nearly \$68,000,000 of its actual value is covered by bonded indebtedness or other obligations bearing a fixed rate of interest far below that rate, and that the balance of the eight per cent return remaining after paying the interest would go to the holders of stock having a par value of \$20,461,200, the real value of which is \$7,000,000, if the easements are valued at \$5,000,000, or \$2,000,000, if they are excluded, which would necessarily be greater than any eight per cent return on the value of that stock.

* * * So that, in determining whether the rates fixed by the commission are confiscatory, we are finally remitted to a few simple realities, such as the past earnings of the company, the returns usually received by other companies engaged in the same business in other fields under somewhat similar conditions, the rates which the company has voluntarily fixed for its service in the past, the decrease in the purchasing power of the dollar, and the effect which other orders of the commission have had upon the earning power of the company. * * * So that the company is entitled to such an allowance as will not only adequately provide for current repairs, but for depreciation due to necessary

retirements, obsolescence, and the diminishing utility of property which can not be arrested by repairs. * * * In valuing the property for rate-making purposes the commission bases its conclusion upon its present value, and not upon its original cost, and in fact the case of *Havre de Grace Bridge Co. v. Public Service Commission*, 132 Md. 24, 103 Atl. 319, *supra*, left it no alternative. But if it was essential to adopt that method for ascertaining the value of the property to which the rates were applied, it is not easy to see why it should not be adopted in estimating the amount needed to replace that property, when it is worn out or becomes obsolete and worthless."

§ 599. **Present value true test.**—While all accurate available evidence of the original cost, as well as the cost of reproduction is desirable and helpful in determining the extent of the actual investment necessary to render the service in any particular case, neither these nor the amount of capitalization are conclusive. The actual present market value of the plant or its worth as a going concern is the ultimate practical basis for determining the value of the investment upon which to fix a rate which will produce a fair return. The investment should be represented by the actual market value of the property which is being used for the public and is useful or necessary at the time to render the service which, as a going concern, includes the right of being a body corporate as well as the special privilege of using the streets and other public places of the municipality which is necessary for rendering the service; and as these special franchise privileges are necessary to the operation of the municipal public utility, the actual legitimate expense of securing them is a proper element of the investment, although on the other hand, as the courts have observed, where this privilege is given outright by the municipality it is difficult for the municipal public utility to justify its action in placing a high valuation on its franchise for the purpose of determining the amount of the investment upon which the inhabitants of the municipality, who have already given the privilege, should be required to pay at an increased rate for the service which it receives. At present franchise values receive little consideration in rate cases because of the "indeterminate permit" and of regulation having taken the place of competition—thus creating natural monopolies to which customers must resort in order to secure service.

By way of defining the well-established rule that "what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the

property at the time it is being used for the public," and of determining its practical application as the means of ascertaining the proper valuation and rate base upon which to fix the rate for the service rendered, the following cases are furnished as the basis for the solution of the question so far as it has been settled by our courts.⁵

⁵ *United States*. *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418, mod. in 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. 888; *San Diego Land & C. Co. v. National City, California*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804; *San Diego Land & C. Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. 571; *Stanislaus County v. San Joaquin & C. Canal & Irr. Co.*, 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 241; *Knoxville, Tennessee v. Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *Railroad Comm. of Louisiana v. Cumberland Tel. & T. Co.*, 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. 357; *Lincoln Gas & C. Co. v. Lincoln, Nebraska*, 223 U. S. 349, 56 L. ed. 466, 32 Sup. Ct. 271; *Louisville, Kentucky v. Cumberland Tel. & T. Co.*, 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. 741; *Simpson v. Shepard*, 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Kansas City Southern R. Co. v. United States*, 231 U. S. 423, 58 L. ed. 296, 34 Sup. Ct. 125, 52 L. R. A. (N. S.) 1; *Van Dyke v. Geary*, 244 U. S. 39, 61 L. ed. 973, 37 Sup. Ct. 483, P. U. R. 1917E, 539; *Denver, Colorado v. Denver Union Water Co.*, 246 U. S. 178, 62 L. ed. 649, 38 Sup. Ct. 278, P. U. R. 1918C, 640; *Landon v. Public Utilities Comm. of Kansas*, 249 U. S. 236, 63 L. ed. 577, 39 Sup. Ct. 268; *Galveston Elec. Co. v. Galveston, Texas*, 258 U. S. 388, 66 L. ed. 678, 42 Sup. Ct. 351, P. U. R. 1922D, 159; *State of Missouri v. Public Service Comm. of Missouri*, 262 U. S. 276, 67 L. ed. 981, 43 Sup. Ct. 544, 31 A. L. R. 807, P. U. R. 1923C, 193; *Georgia R. & Power Co. v. Railroad Comm. of Georgia*, 262

U. S. 625, 67 L. ed. 1144, 43 Sup. Ct. 680, P. U. R. 1923D, 1; *Bluefield Water Works & C. Co. v. Public Service Comm. of West Virginia*, 262 U. S. 679, 67 L. ed. 1176, 43 Sup. Ct. 675, P. U. R. 1923D, 11; *Pacific Gas & C. Co. v. San Francisco, California*, 265 U. S. 403, 68 L. ed. 1075, 44 Sup. Ct. 537, P. U. R. 1924D, 817; *Board of Public Utility Comrs. v. New York Tel. Co.*, 271 U. S. 23, 70 L. ed. 808, 46 Sup. Ct. 363; *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 71 L. ed. 316, 47 Sup. Ct. 144, P. U. R. 1927A, 15; *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, 73 L. ed. 653, 49 Sup. Ct. 282; *United R. & Elec. Co. v. West*, 280 U. S. 234, 74 L. ed. 390, 50 Sup. Ct. 123, P. U. R. 1930A, 235; *Western Distributing Co. v. Public Service Comm.*, — U. S. —, 76 L. ed. 655, 52 Sup. Ct. 283, P. U. R. 1932B, 236.

Federal. National Waterworks Co. v. Kansas City, Missouri, 62 Fed. 853, 27 L. R. A. 827; *Milwaukee Elec. R. & C. Co. v. Milwaukee, Wisconsin*, 87 Fed. 577; *Spring Valley Water Works v. San Francisco, California*, 124 Fed. 574; *Boise City Irr. & C. Co. v. Clark*, 131 Fed. 415; *Consolidated Gas Co. v. New York*, 157 Fed. 849, cf. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192; *Spring Valley Water Co. v. San Francisco, California*, 165 Fed. 667; *C. H. Venner Co. v. Urbana Water Works*, 174 Fed. 348; *Cumberland Tel. & T. Co. v. Memphis, Tennessee*, 183 Fed. 875; *Cumberland Tel. & T. Co. v. Louisville, Kentucky*, 187 Fed. 637; *Spring Valley Water Works v. San Francisco, California*, 192 Fed. 137; *Des Moines Water Co. v. Des Moines, Iowa*, 192 Fed. 193; *Des Moines Gas Co. v. Des Moines, Iowa*, 199 Fed. 204, mod. in 238 U. S. 153,

- 59 L. ed. 1244, 35 Sup. Ct. 811, P. U. R. 1915D, 577; *Bonbright v. Geary*, 210 Fed. 44; *Landon v. Public Utilities Comm. of Kansas*, 234 Fed. 152, P. U. R. 1917A, 120; *Goldfield Consol. Water Co. v. Public Service Comm. of Nevada*, 236 Fed. 979; *Spring Valley Water Co. v. San Francisco, California*, 252 Fed. 979, P. U. R. 1919B, 421, 534, app. dis. 253 Fed. 991; *Consolidated Gas Co. v. Newton*, 267 Fed. 231, P. U. R. 1920F, 483, affd. in 258 U. S. 165, 66 L. ed. 538, 42 Sup. Ct. 264; *Southwestern Tel. & T. Co. v. Houston, Texas*, 268 Fed. 878, affd. in 259 U. S. 318, 66 L. ed. 961, 42 Sup. Ct. 486, P. U. R. 1922D, 793; *Wichita Water Co. v. Wichita, Kansas*, 280 Fed. 770; *Winona, Minnesota v. Wisconsin Minnesota Light & Co.*, 276 Fed. 996, P. U. R. 1921A, 146; *Minneapolis, Minnesota v. Rand*, 285 Fed. 818, P. U. R. 1924B, 636; *Jacksonville Gas Co. v. Jacksonville, Florida*, 286 Fed. 404; *Monroe Gas Light & Co. v. Michigan Public Utilities Comm.*, 292 Fed. 139, P. U. R. 1923E, 661; *Mobile Gas Co. v. Patterson*, 293 Fed. 208, P. U. R. 1924B, 644, mod. in 271 U. S. 181, 70 L. ed. 870, 46 Sup. Ct. 445; *Southwestern Bell Tel. Co. v. Ft. Smith, Arkansas*, 294 Fed. 102, affd. in 270 U. S. 627, 70 L. ed. 768, 46 Sup. Ct. 206; *Streator Aqueduct Co. v. Smith*, 295 Fed. 385, P. U. R. 1924D, 261; *Joplin Gas Co. v. Public Service Comm. of Missouri*, 296 Fed. 271, P. U. R. 1924D, 137; *Swan v. Public Utilities Comm. of Kansas*, 298 Fed. 114; *Reno Power, Light & Co. v. Public Service Comm. of Nevada*, 298 Fed. 790, 300 Fed. 645; *Van Wert Gaslight Co. v. Public Utilities Comm. of Ohio*, 299 Fed. 670; *Indiana Bell Tel. Co. v. Public Service Comm. of Indiana*, 300 Fed. 190; *New York Tel. Co. v. Prendergast*, 300 Fed. 822; *New York & Queens Gas Co. v. Prendergast*, 1 Fed. (2d) 351; *Westinghouse Elec. & Mfg. Co. v. Denver Tramway Co.*, 3 Fed. (2d) 285; *Chesapeake & Potomac Tel. Co. v. Whitman*, 3 Fed. (2d) 938; *Southern Bell Tel. & T. Co. v. Railroad Comm. of South Carolina*, 5 Fed. (2d) 77, P. U. R. 1926A, 6; *Consolidated Gas Co. v. Prendergast*, 6 Fed. (2d) 243, mod. in 272 U. S. 576, 71 L. ed. 420, 47 Sup. Ct. 198; *Northwestern Bell Tel. Co. v. Spillman*, 6 Fed. (2d) 663, P. U. R. 1926A, 330; *Kings County Lighting Co. v. Prendergast*, 7 Fed. (2d) 192, mod. in 272 U. S. 579, 71 L. ed. 421, 47 Sup. Ct. 199; *Brooklyn Union Gas Co. v. Prendergast*, 7 Fed. (2d) 628, P. U. R. 1926A, 412; *Ashland Water Co. v. Railroad Comm. of Wisconsin*, 7 Fed. (2d) 924, P. U. R. 1926B, 293; *Citizens Gas Co. v. Public Service Comm. of Missouri*, 8 Fed. (2d) 632; *New York & Co. Gas Co. v. Prendergast*, 10 Fed. (2d) 167; *Springfield Gas & Co. v. Public Service Comm. of Missouri*, 10 Fed. (2d) 252, P. U. R. 1926C, 858; *Middlesex Water Co. v. Board of Public Utility Comrs.*, 10 Fed. (2d) 519, P. U. R. 1926C, 707, appeal dis. in 275 U. S. 483, 72 L. ed. 385, 48 Sup. Ct. 18; *Monroe Gaslight & Co. v. Michigan Public Utilities Comm.*, 11 Fed. (2d) 319, P. U. R. 1926D, 13; *Pacific Tel. & T. Co. v. Whitecomb*, 12 Fed. (2d) 279, P. U. R. 1926D, 815, affd. in 276 U. S. 97, 72 L. ed. 483, 48 Sup. Ct. 223; *United Fuel Gas Co. v. Railroad Comm. of Kentucky*, 13 Fed. (2d) 510, affd. in 278 U. S. 300, 73 L. ed. 390, 49 Sup. Ct. 150; *United Fuel Gas Co. v. Public Service Comm. of West Virginia*, 14 Fed. (2d) 209, affd. in 278 U. S. 322, 73 L. ed. 402, 49 Sup. Ct. 157; *Brooklyn Borough Gas Co. v. Prendergast*, 16 Fed. (2d) 615, P. U. R. 1927A, 200; *Columbus Gas & Co. v. Columbus, Ohio*, 17 Fed. (2d) 630, P. U. R. 1927C, 639; *Idaho Power Co. v. Thompson*, 19 Fed. (2d) 547, P. U. R. 1927D, 388; *Cambridge Elec. Light Co. v. Atwill*, 25 Fed. (2d) 485, P. U. R. 1928E, 253; *Plainfield-Union Water Co. v. Board of Public Utility Comrs.*, 30 Fed. (2d) 846, P. U. R. 1929D, 3; *Queens Borough Gas & Co. v. Prendergast*, 31 Fed. (2d) 339, P. U. R. 1928E, 791; *Greencastle Water Works Co. v. Public Service Comm. of Indiana*, 31 Fed. (2d) 600, P. U. R. 1929D, 287; *Vincennes Water Supply Co. v. Public Service*

Comm. of Indiana, 34 Fed. (2d) 5, P. U. R. 1930B, 216, writ of cert. denied in 280 U. S. 567, 74 L. ed. 621, 50 Sup. Ct. 26; Great Falls Gas Co. v. Public Service Comm. of Montana, 34 Fed. (2d) 297, P. U. R. 1929E, 628; Fort Worth Gas Co. v. Fort Worth, Texas, 35 Fed. (2d) 743, P. U. R. 1930C, 203; New York Tel. Co. v. Prendergast, 36 Fed. (2d) 54, P. U. R. 1930B, 33; Illinois Bell Tel. Co. v. Moynihan, 38 Fed. (2d) 77, P. U. R. 1930B, 148, mod. and remanded in Smith v. Illinois Bell Tel. Co., 282 U. S. 133, 75 L. ed. 255, 51 Sup. Ct. 65; Illinois Bell Tel. Co. v. Smith, 39 Fed. (2d) 157; Louisville, Kentucky v. Louisville R. Co., 39 Fed. (2d) 822, P. U. R. 1930C, 165; Board of Public Utility Comrs. v. Elizabethtown Water Co., 43 Fed. (2d) 478; Michigan Bell Tel. Co. v. O'Dell, 45 Fed. (2d) 180, P. U. R. 1931B, 192; Florida Tel. Corp. v. Florida Railroad Comm., 47 Fed. (2d) 467, P. U. R. 1931C, 119; Clarke v. Hot Springs Elec. Light & Co., 55 Fed. (2d) 612; Columbus Gas & Co. v. Columbus, Ohio, 55 Fed. (2d) 56, P. U. R. 1932B, 4; Los Angeles Gas & Co. v. Railroad Comm. of California, 58 Fed. (2d) 256; Wabash Valley Elec. Co. v. Singleton, — Fed. (2d) —, P. U. R. 1932B, 225.

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937, P. U. R. 1928A, 811, affd. in 279 U. S. 125, 73 L. ed. 637, 49 Sup. Ct. 325.

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90, 129 Atl. 22; *Miles v. Public Service Comm.*, 151 Md. 337, 135 Atl. 579; *Electric Public Utilities Co. v. West*, 154 Md. 445, 140 Atl. 840; *West v. Byron (Md.)*, 138 Atl. 404, P. U. R. 1927E, 286; *West v. United R. & Elec. Co. (Md.)*, 142 Atl. 870.

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New Jersey. Long Branch Comm. v. Tintern Manor Water Co., 70 N. J. Eq. 71, 62 Atl. 474; *Interstate Tel. & T. Co. v. Board of Public Utility Comrs.*, 84 N. J. L. 184, 86 Atl. 363; *Passaic v. Board of Public Utility Comm.*, 87 N. J. L. 705, 95 Atl. 127, P. U. R. 1915E, 625; *Elizabethtown Gas Light Co. v. Board of Public Utilities Comrs.*, 95 N. J. L. 18, 111 Atl. 729, P. U. R. 1920F, 1001; *Hackensack Water Co. v. Board of Public Utility Comrs.*, 98 N. J. L. 41, 119 Atl. 84; *Acquackanonk Water Co. v. Board of Public Utility Comrs.*, 100 N. J. L. 169, 125 Atl. 33; *Atlantic City Sewerage Co. v. Board of Public Utility Comrs.*, 100 N. J. L. 395, 125 Atl. 327; *Passaic*

Consol. Water Co. v. Board of Public Utilities Comm. (N. J.), 139 Atl. 324, P. U. R. 1928B, 242; *Middlesex Water Co. v. Board of Public Utility Comrs. (N. J.)*, 140 Atl. 256, P. U. C. 1928C, 589; *Plainfield-Union Water Co. v. Board of Public Utility Comrs. (N. J.)*, 140 Atl. 785, P. U. R. 1928C, 657; *Millville Elec. Light Co. v. Board of Public Utility Comrs.*, 3 Misc. (N. J.) 412, 128 Atl. 546, P. U. R. 1926A, 227.

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N. E. 330, P. U. R. 1919A, 888; Lima v. Public Utilities Comm., 103 Ohio St. 501, 134 N. E. 453, P. U. R. 1922E, 657; Cincinnati v. Public Utilities Comm., 105 Ohio St. 181, 137 N. E. 36, P. U. R. 1923B, 755, 767, 853, P. U. R. 1923C, 111, 338, 340; Portsmouth v. Public Utilities Comm., 108 Ohio St. 272, 140 N. E. 604, P. U. R. 1923E, 834; Lindsey v. Public Utilities Comm., 111 Ohio St. 6, 144 N. E. 729; Cincinnati v. Public Utilities Comm., 113 Ohio St. 259, 148 N. E. 817; Celina v. Public Utilities Comm., 116 Ohio St. 596, 157 N. E. 72, P. U. R. 1927D, 796; Hardin-Wyandot Lighting Co. v. Public Utilities Comm., 118 Ohio St. 592, 162 N. E. 262, P. U. R. 1928D, 500; Logan Gas Co. v. Public Utilities Comm., 121 Ohio St. 507, 169 N. E. 575, P. U. R. 1930B, 246; Logan Gas Co. v. Public Utilities Comm., 124 Ohio St. 248, 177 N. E. 587.

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Washington. Puget Sound Elec. R. Co. v. Railroad Commission, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763; Everett v. Department of Public Works, 125 Wash. 341, 215 Pac. 1045, P. U. R. 1923E, 218; State v. Department of Public Works, 143 Wash. 67, 254 Pac. 839, P. U. R. 1927C, 781; Columbia River Tel. Co. v. Department of Public Works, 148 Wash. 395, 269 Pac. 6, P. U. R. 1928E, 520; State v. Denney, 150 Wash. 690, 274 Pac. 791, P. U. R. 1929C, 650.

West Virginia. Huntington v. Public Service Comm., 89 W. Va. 703, 110 S. E. 192, P. U. R. 1922C, 553; Charleston v. Public Service Comm., 95 W. Va. 91, 120 S. E. 398,

§ 600. **Theories of valuation considered.**—The Supreme Court of the United States in the case of *Knoxville, Tennessee v. Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148, decided in 1909, after observing that “regulation of public service corporations which perform their duties under conditions of necessary monopoly will occur with greater and greater frequency as time goes on,” defined this rule and indicated the manner of its application as follows: “The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to obviously incorrect results if the cost of reproduction is not diminished by the depreciation which has come from age and use. * * * It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages, with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case. * * * Counsel for the company urge rather faintly that the capitalization of the company ought to have some influence in the case in determining the valuation of the property. It is a sufficient answer to this contention that the capitalization is shown to be considerably in excess of any valuation testified to by any witness, or which can be arrived at by any process of reasoning. * * * Bonds and preferred and common stock issued under such conditions afford neither measure of, nor guide to, the value of the property. * * * Before coming to the question of profit at all the company is entitled to earn a suffi-

P. U. R. 1924B, 601; *Natural Gas Co. v. Public Service Comm.*, 95 W. Va. 557, 121 S. E. 716, P. U. R. 1924D, 346; *Pittsburg &c. Gas Co. v. Public Service Comm.*, 101 W. Va. 63, 132 S. E. 497, P. U. R. 1926D, 280; *Huntington v. Public Service Comm.*, 101 W. Va. 378, 133 S. E. 144, P. U. R. 1926D, 835; *Bluefield Tel. Co. v. Public Service Comm.*, 102 W. Va. 296, 135 S. E. 833; *Elkins v. Public Service Comm.*, 102 W. Va. 450, 135 S. E. 397, P. U. R. 1927B, 270; *Harrisville v. Public Service Comm.*, 103 W. Va. 526, 138 S. E. 99, P. U. R. 1927E, 11; *Charleston v. Public Service Comm. (W. Va.)*, 159 S. E. 38, P. U. R. 1931E, 74.

Wisconsin. State v. Railroad Commission, 137 Wis. 80, 117 N. W. 846; *Appleton Water Works Co. v. Railroad Commission*, 154 Wis. 121, 142 N. W. 476, 47 L. R. A. (N. S.)

770, Ann. Cas. 1915B, 1160; *Oshkosh Water Works Co. v. Railroad Commission*, 161 Wis. 122, 152 N. W. 859, L. R. A. 1916F, 592, P. U. R. 1915D, 336; *Waukesha Gas &c. Co. v. Railroad Commission*, 181 Wis. 281, 194 N. W. 846, P. U. R. 1923E, 634; *Wisconsin-Minnesota Light &c. Co. v. Railroad Commission*, 183 Wis. 96, 197 N. W. 359, P. U. R. 1924C, 534; *Wisconsin-Minnesota Light &c. Co. v. Railroad Commission*, 183 Wis. 104, 197 N. W. 363; *Milton v. Railroad Commission*, 185 Wis. 294, 201 N. W. 381; *Waukesha Gas &c. Co. v. Railroad Commission*, 191 Wis. 565, 211 N. W. 760, P. U. R. 1927B, 545; *Pabst Corp. v. Railroad Commission*, 199 Wis. 536, 227 N. W. 18; *Wisconsin Hydro-Elec. Co. v. Railroad Commission (Wis.)*, 243 N. W. 322.

cient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning."

In determining the proper rate base as a matter of valuation and the reasonable rate for the service, the courts will presume that the determination of the commission on the question of values has been fair and that the rate fixed is reasonable, and, unless the evidence fails to sustain this presumption, the courts will not interfere with the findings and orders of the commission on questions of fact. Where the risk of the investment is small and there is no competition in the field the rate of return is reasonably less than in cases where competition exists and the hazards of the investment are greater. In determining the proper rate base the present value of the property used and useful in rendering the service should be appraised at the current market prices and to these items should be added original organization costs and actual investments in franchises, going-concern values, and working capital, with a proper consideration of the items of depreciation. While the company may not be in a position to object to values which have been given and accepted by it as correct, or to those provided by its records, the commission and the courts are not precluded from fixing other values where the facts justify them.

In estimating the future income of the company for the purpose of determining a reasonable rate, average income and conditions prevailing through a period of years are proper items to be considered. In considering the historic costs of the plant, elements of value which have been paid as operating costs from current revenues are not properly included, although the apportionment of expenditures to capital and operating expenses is a matter of accounting upon which there seems to be no fixed standards. Going-concern values, however, are properly considered a part of the investment and should be included in the valuation, whether based on expenditures of the company in building up its business, on the result to the company of the growth of the city and the consequent increase of its business, or on the efficiency of its management as reflected by its financial standing.

The use of average and not "spot" prices is the proper method of determining reproduction costs, which average usually covers a number of years. While the rate fixed must be reasonable in view of current rates of interest, returns on investments, and business conditions existing at the time, future conditions covering a series of years may properly be included in the estimate. These items of valuation and the method of determining the proper rate base and the reasonable rate for the service are discussed clearly and comprehensively in the case of *Los Angeles Gas &c. Corp. v. Railroad Comm. of California*, 58 Fed. (2d) 256, where the court spoke in part as follows: "Admittedly the task of rate making is one to be essayed only by specialists, men whose research into the problems of business economy, with all of its variants of money cost, depreciation, and commercial outlook, has given them peculiar qualifications for the work. Rate cases, when they are brought into court, come impressed with the presumption that the state agency to which has been committed the duty to regulate public utilities has dealt fairly with the business affected, and that in every matter wherein, under any view, a discretion can be said to have been fairly and reasonably exercised, the courts will not interfere with the orders made.

* * * If the experience of the company under regulation has been, as the commission finds, that returns have exceeded estimates, then it may well be that its net will be greater than the per cent allowed under the last rate schedule. With a history of successful and profitable business, and no real competition to meet in its field of service, the hazard is small and the probabilities of continued demand assured. Electricity has not to any great extent supplanted gas as a fuel. All of the conditions noted, as affecting the business of the company, sustain the commission in its statement that the plaintiff's securities are capable of being marketed at moderate interest rates, and that it will continue to grow.

* * * What the commission did then in reaching its base rate figure of fair value was to include all items of property used and useful in the operative plant of the plaintiff, and appraise the value thereof at current market prices. It included original organization costs and franchise values as well. It assumed a live active plant, and affirmed that the ultimate total included all costs of attaching business as the same had accrued and had been accounted for. Its fair value figure, assuming the correct estimate and allocation of items hereinafter referred to, was one which essentially represented the investment cost, at the present time, of all the operative property

and its connected incidentals. The commission used the books of the company, which furnished it with the details and items in complete form. * * * Where a utility company in rate proceedings adopts, as correct, an amount fixed in an initial order made at the time it came under regulation, it ought not to be permitted to assail that amount at this time on the ground that it is inaccurate. * * * Depreciation was a matter not capable of definite ascertainment, and the commission had the right to use its judgment under all of the facts displayed before it, aided in weighing the evidence by its experience in dealing with this company's property and other like utilities, and to adopt a per cent depreciation rather than the amount deducted by the company. It is not demonstrated by any evidence that the allowance made by the commission as for depreciation annuity for the future would not, in its amount, be equivalent to the replacement outlay at going costs. * * * Basically, the object of an appraisalment for rate-making purposes is to find the full value of the investment in the business. The investment is represented by the value of the property used and necessary in the business—not what it would cost to promote and establish a like business starting today. In fixing the estimated income for the future, the commission adjusted its figures to average temperatures. The company complained that at least the two preceding years had been attended by unusually high temperatures and consequent diminished demand for gas, and that it was improper to assume average temperatures. And yet the practice adopted was fair. We may note that the winter of 1931-32 in the city of Los Angeles, as it has thus far progressed at the end of January, has been one of the coldest in many years. And so, the rule of assumed average temperatures seems to be the only reasonable one to adopt. During unusually mild winters the utility service will earn less than was estimated to be allowed to it, and in colder winters will earn more. * * * For working cash capital, an amount of \$2,333,850 was claimed; \$645,000 was allowed. This item was to cover delayed income receipts, occasioned by the wait between time of delivery of gas to the consumer and collection of the charges. In brief, the company claimed a sum representing total earned amounts at retail prices. The commission found that cost of service should be considered, rather than retail charges, which latter would include profit. It considered, in computing the amount, the fact that the company, in its purchase of natural gas, was extended thirty days' credit. An offset was accordingly charged against the expense

total in arriving at the result. We think the method used was a proper one. * * * In its reproduction cost it rejected the two items for promotion and financing aggregating \$7,500,000 as unwarranted by the experience of the company, but it included in its estimate items which it held reasonably corresponded to these items as reflected by the actual history of the company. So far as the rejection of the two items just referred to is concerned, we think the commission was correct in its conclusion if the regulation of rates is to be kept within the domain of practicality rather than fancy. See *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 42 Sup. Ct. 351, 66 L. ed. 678. It is undoubtedly true that the engineers, in estimating reproduction costs, may fairly include items which in their judgment would be involved in the reconstruction of the whole enterprise. It does not follow that these figures must be accepted by the commission or by the court as items to be included in its actual value. * * * The Supreme Court, however, has so definitely and emphatically held that the company is entitled to a reasonable rate of return upon the fair value of its property, regardless of whether or not that property was derived from the consumers by the imposition of excessive rates or otherwise (*Board of Pub. Utilities Comrs. v. New York Tel. Co.*, 271 U. S. 23, 46 Sup. Ct. 363, 70 L. ed. 808), that the mere fact that an excessive amount may have been allowed to the company by way of income to cover expenditures is not decisive of the issue. We pause here, however, to advert to the fact that overhead is involved in both the historic cost and the reproduction value. It is clear, we think, that in considering the historic cost of the plant the company can not include therein elements of value which have been apportioned to general expense and paid from the current revenues as an expense of operation. * * * The company in the case at bar is seeking the aid of a court of equity to exact from the consumers a larger amount than has been accorded to them by the commission. Should equity aid the company to again exact from the consumers income upon a sum which they have already paid to them, not as capital, but as income? We are not without authority upon this exact question. It has been held that this can not be done. *Natural Gas Co. v. Public Service Comm.*, 95 W. Va. 557, 121 S. E. 716.

"It should be observed in connection with the item of overhead that we are not dealing with a definite item of property such as a gas main, but with a system of bookkeeping and accounting as to which judgments may differ; whether an at-

torney's fee paid by the company in the conduct of its business should be charged to capital and the expenditure added to the rate base, or whether it should be treated as an incidental expenditure in the management and control of its business, is obviously a matter of judgment upon which there can be no conclusive determination. It is in this situation that the commission allows the company to make an apportionment of its expenditures from year to year between capital and operating expenses. We conclude then, that the company can not justly complain of an apportionment of its capital by the disallowance of its present claims of the overhead addition thereto, where the company has already been paid that overhead in conformity with its own claims that only six and thirty-five hundredths per cent of it represented capital expenditure. * * * In either case, it is clear that the historic overhead cost is a fairer basis for fixing the overhead involved in the value of the property than the reproduction overhead cost, scientifically apportioned. We conclude that, in choosing between the cost of reproduction overhead and the historic cost overhead, the commission was justified by the action of the company with reference to overhead in accepting the company's own historic contention with reference to overhead, that is, in acting upon its admission with reference thereto fixing it at six and thirty-five hundredths per cent and in rejecting the overhead which reasonably would be included at a higher percentage (22.32 to 24.27 per cent) of the reproduction cost. * * * The railroad commission expressly refused to make any specific allowance for going-concern value. This is directly in the teeth of the decisions of the Supreme Court of the United States. *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 47 Sup. Ct. 144, 71 L. ed. 316, *supra*. * * * Regardless of how the company acquired the going-concern value, it is entitled to have that value considered as a part of its investment. While somewhat the same principle is involved as in the case of the indirect overhead, the situation is not identical. Going-concern value is something like the unearned increment of real estate. It is partly the result of the expenditures of the company, partly the result of the growth of the city, partly the result of the efficiency of management, partly the result of reputation of the company in its financial affairs, and the skill of its employees in so utilizing the property as to produce a reasonable revenue therefrom. * * * Here, again, it should be noted that expenditures usually allowed as costs of conducting business in the accounts of a public utility should not be again

charged to the public as capital expenditures. A new company in establishing its business would recognize that such expenditures were allowable as a legitimate expense of doing business, and a company long established has already had that advantage. Such an allowance for current expenditures is a reasonable expectation whether the company is a going concern or not.

* * *

"Having thus concluded that going-concern value has been partially allowed in the historic overhead, in the historic current expenditures to the end of creating going-concern value, and in the allowance of a profit on the bond and preferred stock money due to its credit, we pass the further consideration of that subject until our summation. * * * In the case at bar we have the situation exactly reversed. The current rates for labor and material have gradually decreased owing to the depression. * * * They illustrate the effect of the falling prices, and this court will take judicial notice that the costs of reproduction were lessened during the year in which the old rates have been collected by reason of the temporary injunction herein (January 1, 1931, to January 1, 1932). As to judicial notice, see *Atchison, T. & S. F. R. Co. v. United States*, 284 U. S. 248, 52 Sup. Ct. 146, 76 L. ed. —, decided January 4, 1932. However, it has been definitely decided by the Supreme Court that spot prices, that is, prices on a particular day, assumed as a basis for capitalization, is not the proper method of determining reproduction costs. *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 47 Sup. Ct. 144, 71 L. ed. 316, *supra*. This, of course, is not only settled by authority, but also is clearly reasonable, for the value of the plant taking years to construct and involving large outlays during a period of fluctuating prices should not be judged by the arbitrary selection of a date as controlling price levels during the entire period. The method sanctioned by the Supreme Court in *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 47 Sup. Ct. 144, 71 L. ed. 316, *supra*, was a determination of reproduction cost upon a ten-year average. * * *

"It has accumulated a depreciation reserve of \$9,350,689 in its gas department. It is claimed by the company that the commission deducted for depreciation \$7,650,000, whereas the company contends that the amount which should have been deducted from the value of its property new for accrued depreciation during the entire history of the company is a total of only \$3,470,326. Thus, the amount claimed as accrued depreciation by the company is \$5,880,363, less than the amount they have set aside

as a reserve to take care of that depreciation. The company also claims, however, that it should have been allowed, as a depreciation annuity for current depreciation, \$1,300,000. In short, the company claims an annuity for depreciation which would in three years equal the total depreciation which it contends has accumulated during its entire history. These observations of the incongruity of the company's claims are made at the outset of the discussion of depreciation to indicate the inherent difficulties in the situation. It has been established that the amount accumulated for depreciation reserve can not be utilized as a basis for diminishing the annual allowance for depreciation below a reasonable sum fixed therefor. * * * Notwithstanding the position of the commission, it is definitely and authoritatively determined that the rate base must be determined by proper deduction for actual depreciation and the annual allowance for depreciation must reasonably reflect the actual depreciation reasonably to be expected annually during the existence of the current rate. * * * If we understand the decision of the Supreme Court, it would require a consideration of what was just and fair under all the circumstances to deduct for depreciation due to the loss of value in the manufacturing plant. The solution adopted by the commission in the case at bar was to treat the manufacturing plant as a stand-by plant. * * * The public having paid the accrued depreciation upon that claim authorized and fixed by the regulating body should not be required to again compensate for what was claimed to be annually accruing depreciation by shifting that depreciation forward to be again paid for, in the absence of clear proof, nor, on the other hand, to pay an income upon the reserve for depreciation which has been paid upon a claim for compensation for actual depreciation, unless by clear proof it is shown that the accumulated reserve is excessive. * * * One of the company's contentions is based upon the claim that working cash capital should include the deferred payments due it from the users of gas owing to the lag between the furnishing of the gas and the receipt of moneys therefrom. In other words, it wishes to include in its working cash capital its bills receivable and exclude its bills payable. We see no reason for this allowance. The working cash capital represents the amount of cash that the company is required to carry on hand to do business, and for that reason necessarily idle money. * * * The company insists that the evidence requires a finding that eight per cent is a reasonable rate of return upon the fair value of its property, but we can not sustain this

contention. The question of the percentage of return upon a public utility depends to a large extent upon the hazard as well as the current price of money which also varies with the hazard. We do not accept the testimony of financiers that eight per cent represents the rate of return upon "similar" enterprises, for the fact is that there are no similar enterprises except other gas companies and electric companies operating in California under the jurisdiction of the California railroad commission whose rates are fixed in the same manner as those of the plaintiff."

The municipality is generally taken and accepted as the proper unit for the valuation of public utility property for rate making and other purposes, because this includes the property which is used and useful in providing the service. The municipality is often expressly made the unit for regulation and valuation of such utilities by the statute creating the commission, and it is generally regarded as the logical and only practical basis to be used for such purposes. The determination of this question of public policy, however, is a legislative matter, over which the courts have no jurisdiction, so long as the unit fixed is feasible and clearly defined.

As a matter of business expediency it is obvious, in most cases at least, that the local community which is being served is the proper and only practicable basis of making such valuations. Any smaller unit would not be sufficiently comprehensive to provide uniform regulation in order to avoid discrimination and larger units would be objectionable for the same reason and would be prohibitive in the expense and the amount of work necessary to determine a valuation, which would then have to be allocated to the community affected. Property used and useful in serving the particular locality or municipality is generally the only property affected in determining the proper rate base and in fixing values for other purposes, including the sale or merger of plants necessary and used in serving the particular community.

Where the local utility, however, is only a distributing plant and secures its energy and product for distribution to the community from another plant or system the most logical and equitable method of allocating the property used and useful in rendering the service would seem to be according to the sales made in the locality as compared to the total sales of the system providing the product.

That the municipality is the proper local unit for determining the rate base, and the elements which should be considered in

determining the proper rate for the service are clearly discussed and established as follows in the case of Wabash Valley Electric Co. v. Singleton, — Fed. (2d) —, P. U. R. 1932B, 225: "In fixing the value of plaintiff's property, used and useful, for the supplying of electricity to such city, defendant commission fixed first, the value of its local property. It next fixed the 'gateway' price for all electrical current furnished by it to Martinsville, this being the price allowed for such current at the city limits. In determining this price, it took the average cost per kilowatt hour of all current handled by plaintiff through its entire system and added thereto an arbitrary amount for depreciation and return. In other words, after determining the value of the local property, used and useful, in supplying electricity for such city, and determining the 'gateway' price for supplying same, then defendant commission proceeded to fix a schedule of rates therefor without regard to the effect of such procedure upon the rate or return which plaintiff will realize from its entire system upon the entire value thereof. * * * That is to say, the Utility Act gives to either the municipality, the citizens thereof, or the utility itself, the privilege of petitioning the public service commission for an adjustment of rates. * * * It is further contended that a reasonable return must be had upon the value of all its property, before the rates at Martinsville can be adjusted. All of its property is not used and useful for the supplying of electricity to such municipality. Much of it is used for other municipalities, industrial plants, etc., with which defendant city is not concerned. This section refers to the property that is used and useful in connection with the furnishing of a utility to any municipality under consideration, in this instance, Martinsville. To give it any other construction would make the very law, which was enacted for the benefit of the municipalities and the inhabitants thereof, as well as for the benefit of the utility, prohibitive, from the viewpoint of the public. It would make it necessary to have all the property of the entire system appraised each time a single municipality, or ten or more of its citizens petitioned the defendant commission for a revision of its rates. The expense alone, if allowed to be taxed as an operating expense, as contended by plaintiff, would be so great that in many, if not every instance, it would result in an increase, instead of a reduction in rates. * * * Whether any division of the state, other than a municipality, shall be designated as a unit for the purpose of fixing rates for a utility, is a matter of public policy to be exercised by the legislature. Until that is

done, neither the public service commission, nor a court, can consider any other unit than that which is now fixed by the legislature, namely, the municipality, in establishing a schedule of rates for the services of a utility in such municipality. The Public Utility Act of Indiana has never been construed in this particular by the Indiana Supreme Court. It is known, however, that such act is patterned generally after the Public Utility Act of Wisconsin, and many of its provisions are identical. The Supreme Court of that state, in a well-reasoned opinion, held that the railroad commission of Wisconsin, which is similar to the public service commission of Indiana, is 'required to treat the municipality as a unit and to base its rate upon the cost to the utility of serving the individual municipality, rather than the average cost of serving many distinct and scattered municipalities.' *Eau Claire v. Railroad Commission*, 178 Wis. 207, P. U. R. 1922D, 666, 677, 189 N. W. 476. * * *

"If the schedule of rates, as fixed by the commission, is sufficient to yield a reasonable return upon the valuation, as found by this court, then the order of which complaint is made can not be disturbed, even though the valuation, as fixed by the commission, is much too low. It is the function of the court to determine whether or not the rates, as fixed by the commission, yield such a small return upon the value of plaintiff's property (considering the municipality as a unit) as to amount to confiscation, and thereby violate the Constitution of the United States. * * * These items, in general, are computed by experts, founded upon well-defined rules and upon experience, yet, they are not and can not be as accurate as an appraisal of something actually in existence. When it is recalled, in the instant case, that an amount in the sum of approximately \$30,000 for this purpose is added to the sum of \$73,888, the value of the physical property, it would clearly indicate that such amount is sufficient. * * * Bearing in mind the fact that the plaintiff is only a distributing utility, that it purchases practically all of its current from another utility, with which it is affiliated, it appears that the most logical and equitable method of making this allocation is on the basis of the ratio of actual sales of kilowatt hours to Martinsville and its consumers to the total sales of kilowatt hours by plaintiff during the year 1929, that being the last calendar year before the date of the hearing. * * *

It is contended by the plaintiff that an allowance should have been made for the 'cost of financing' in determining the value of its property at Martinsville and the value of that part of all

its property allocated thereto. This has been held in some instances to be a proper charge. In the instant case, however, there is no evidence that such a cost was incurred, or, in the event of reconstruction, that it would be necessary to incur such an expense. The master properly refused to make an allowance for this item. *Vincennes Water Supply Co. v. Indiana Public Service Commission* (1929), 34 Fed. (2d) 5, P. U. R. 1930B, 216.

* * * There is no fixed rule by which to determine the rate of return to which a public utility is entitled. Each case must be considered separately, and much depends upon the circumstances and the locality. Upon this question it has been said by the United States Supreme Court that 'among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted, and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them.' *Willcox v. Consolidated Gas Co.* (1909), 212 U. S. 19, 48, 53 L. ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034. This court has, at various times, fixed different rates of return, depending upon all of the surrounding circumstances, as shown in each particular case. * * *

The business in which plaintiff is engaged is not surrounded by any unusual hazards, although competition in that field is rather keen. The demand for electrical current is increasing from year to year, rather than diminishing, and plaintiff and its affiliated companies comprise one of the largest groups engaged in the manufacture and distribution thereof in the country. A return of seven per cent upon the value, as fixed by this court, will yield a reasonable return upon such value. * * * The actual 'gateway' cost of current delivered to Martinsville, exclusive of any allowance for depreciation and return, was one and thirty-three hundredths cents per kilowatt hour for the year ending May 31, 1930. This price is adequate, and is the price found by this court to be a proper charge for all electrical current furnished during that year to defendant city. The amount delivered was 2,528,511 kilowatt hours at one and thirty-three hundredths cents, making a total of \$33,629.20, which amount plaintiff is entitled to charge as an operating expense for that year. A proper charge of four per cent for depreciation of the value of the physical property allocated to Martinsville has been allowed, but it is not included in the 'gateway' charge. * * * To this balance should be added four per cent of the physical value of plaintiff's property at Martinsville and of the power system allocated

thereto for depreciation. * * * This sum represents a return far in excess of seven per cent of the value of plaintiff's property' (\$204,138) which the court has found to be a reasonable return. Under this state of facts, the schedule of rates provided in the order of the commission in question is adequate to yield a reasonable return upon plaintiff's property, used and useful, in supplying electricity to the city of Martinsville. Such rates are not confiscatory and do not violate any of plaintiff's rights under the Constitution of the United States."

§ 601. Valuation as of the time question determined.—The same court in the case of *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034, decided in 1909, that the value of the property is to be determined as of the time when the inquiry is made regarding the rates, for as the court said: "There must be a fair return upon the reasonable value of the property at the time it is being used for the public. * * * But, where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation * * * a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts."

In discussing the proper valuation and the enhanced costs due to the increased prices of labor and material, the court in the case of *State of Missouri v. Public Service Comm. of Missouri*, 262 U. S. 276, 67 L. ed. 981, 43 Sup. Ct. 544, 31 A. L. R. 807, held as follows: "Obviously, the commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914, and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as forty-five to fifty per centum. * * * It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible. Estimates for tomorrow can not ignore prices of today."

In *Georgia R. &c. Co. v. Railroad Comm. of Georgia*, 262 U. S. 625, 67 L. ed. 1144, 43 Sup. Ct. 680, the court defined the rule of

valuation as follows: "The objections mainly urged relate to the rate base; and one of them is of fundamental importance. The companies assert that the rule to be applied in valuing the physical property of a utility is reproduction cost at the time of the inquiry, less depreciation. The 1921 construction costs were about seventy per cent higher than those of 1914, and earlier dates, when most of the plant was installed. So much of it as was in existence January 1, 1914, was valued at an amount which was substantially its actual cost or its reproduction cost as of that date. The companies claim that it should have been valued at its replacement cost in November, 1921,—the time of the rate inquiry; and that the great increase in construction costs was ignored in determining the rate base. The case is unlike *Missouri v. Public Service Commission*, 262 U. S. 276, 67 L. ed. 981, 43 Sup. Ct. 544, 31 A. L. R. 807, decided May 21, 1923. Here the commission gave careful consideration to the cost of reproduction, but it refused to adopt reproduction cost as the measure of value. It declared that the exercise of a reasonable judgment as to the present 'fair value' required some consideration of reproduction costs as well as of original costs, but that 'present fair value' is not synonymous with 'present replacement cost,' particularly under abnormal conditions. That part of the rule which declares the utility entitled to the benefit of increases in the value of property was, however, specifically applied in the allowance of \$125,000 made by the commission to represent the appreciation in the value of the land owned. The lower court recognized that it must exercise an independent judgment in passing upon the evidence; and it gave careful consideration to replacement cost. But it likewise held that there was no rule which required that, in valuing the physical property, there must be 'slavish adherence to cost of reproduction, less depreciation.' It discussed the fact that, since 1914, large sums had been expended annually on the plant; that part of this additional construction had been done at prices higher than those which prevailed at the time of the rate hearing; and it concluded that, 'averaging results and remembering that values are * * * matters of opinion * * * no constitutional wrong clearly appears.' The refusal of the commission and of the lower court to hold that, for rate-making purposes the physical property of a utility must be valued at the replacement cost, less depreciation, was clearly correct."

In the case of *Bluefield Water Works &c. Co. v. Public Service Comm. of West Virginia*, 262 U. S. 679, 67 L. ed. 1176, 43 Sup.

Ct. 675, the United States Supreme Court further defined the rule of valuations as follows: "It is clear that the court also failed to give proper consideration to the higher cost of construction in 1920 over that in 1915 and before the war and failed to give weight to cost of reproduction, less depreciation, on the basis of 1920 prices, or to the testimony of the company's valuation engineer, based on present and past costs of construction, that the property, in his opinion, was worth \$900,000. The final figure, \$460,000, was arrived at substantially on the basis of actual cost, less depreciation, plus ten per cent for going value and \$10,000 for working capital. This resulted in a valuation considerably and materially less than would have been reached by a fair and just consideration of all the facts. The valuation can not be sustained."

A further discussion of these leading decisions and of the principles involved is made in the case of *Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Comm.*, 292 Fed. 139, as follows: "The disposition of this motion is to be determined by the interpretation and effect given to the *Southwestern Bell*,⁶ the *Bluefield Water*,⁷ and the *Georgia Power*⁸ cases, recently decided by the Supreme Court. They constitute the last word upon the theory and practice involved in fixing a rate base for public utilities, as to which there has been a long-time controversy between historical cost, or actual cost, of prudent investment (less depreciation) upon the one side, and reproduction cost (less depreciation) upon the other. * * * The fact that excess, along with what is called surplus or undivided profits, has been invested in further property, does not deprive the utility of its full right to earn a return thereon. Past high profits, under a contract or under public supervision, form no obstacle to enjoining a later noncompensatory rate (the *Consolidated Gas case*⁹); and it can make no difference whether they have been paid out in dividends and reinvested as additional capital, or have been directly reinvested. * * * Obviously and as expressly held in the *Georgia Power* case, this reproduction cost at that date is not absolutely controlling. It must be contemplated that

⁶ *State of Missouri v. Public Service Comm. of Missouri*, 262 U. S. 276, 67 L. ed. 981, 43 Sup. Ct. 544, 31 A. L. R. 807.

⁷ *Bluefield Water Works &c. Co. v. Public Service Comm. of West Virginia*, 262 U. S. 679, 67 L. ed. 1176, 43 Sup. Ct. 675, P. U. R. 1923D, 11.

⁸ *Georgia R. & Power Co. v. Railroad Comm. of Georgia*, 262 U. S. 625, 43 Sup. Ct. 680, 67 L. ed. 1144, P. U. R. 1923D, 1.

⁹ *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 66 L. ed. 538, 42 Sup. Ct. 264.

a rate fixed by the commission is to stand for a substantial period. * * * We reject entirely the whole subject of capitalization, stocks, and bonds. We fail to see how it can have any pertinence. The utility is entitled to an opportunity to earn a reasonable minimum return upon the proper rate base. How many securities are outstanding is of no importance."

That valuations made by public appraisers, especially qualified as experts in such matters, are properly considered as evidence by the commission, even though the party making the appraisal may have been formerly employed by the company or one of its subsidiary concerns, whose property is being appraised, is the effect of the decision in the case of *In re New England Power Corp. (Vt.)*, 156 Atl. 390, P. U. R. 1932A, 11, where the court said: "But it is not to be taken here that this firm of Barker & Wheeler was in the regular employment of any of the corporations. The fact is to the contrary. It was a public appraiser serving anyone who from time to time sought its assistance. We can not accept the idea that it was intended that one so engaged should be disqualified under the statute by the mere fact that he had been employed in that capacity on one or more occasions by a subsidiary corporation, or by the very corporation making application to the commission. Such fact might affect the weight to be given to his testimony, but it would not necessarily disqualify him. * * * There is nothing before us to indicate that Barker or his firm was in fact interested in matters before the commission. His judgment, his integrity, and his fairness are unchallenged. On the record, we can not say that the ruling of the commission was erroneous."

§ 602. **Present value as a going concern.**—The case of *National Waterworks Co. v. Kansas City, Missouri*, 62 Fed. 853, 27 L. R. A. 827, decided in 1894, furnishes an early decision to the effect that capitalization of the earnings, the original cost of construction or the cost of reconstruction is neither a fair nor an accurate test of the valuation of the investment, for as the court said: "Capitalization of the earnings will not, because that implies a continuance of earnings, and a continuance of earnings rests upon a franchise to operate the waterworks. The original cost of the construction can not control, for 'original cost' and 'present value' are not equivalent terms. Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of

purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is today. A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city—not only with a capacity to earn, but actually earning—makes it true that ‘the fair and equitable value’ is something in excess of the cost of reproduction.”

The present value of the plant as a going concern is adopted as the proper rule of valuation in the case of *Acquackanonk Water Co. v. Board of Public Utility Comrs.*, 100 N. J. L. 169, 125 Atl. 33: “The city of Bayonne contends that the rates fixed for that city are excessive, and that the value put upon the property was excessive, and refers to a lower appraisal made by the state in 1912. But there has been, we think, an increase in the value (as with most properties) since that date, and certainly there is nothing in the evidence which justifies a present value on the basis of the appraisal of 1912. Upon the whole evidence we can not say that the valuation was too high. The next point that Bayonne makes is that it was error to make an allowance for going-concern value. But the decisions are to the contrary. *Public Service Co. v. Public Utility Board*, 84 N. J. L. 463, 87 Atl. 651, L. R. A. 1918A, 421, affirmed 87 N. J. L. 581, 92 Atl. 606, 94 Atl. 534, 95 Atl. 1079, L. R. A. 1917B, 930, L. R. A. 1918A, 421.”

An excellent statement of this principle of present value as the proper basis of valuation is found in the case of *Waukesha Gas & Electric Co. v. Railroad Commission*, 181 Wis. 281, 194 N. W. 846, as follows: “It may as well be said here as anywhere that the courts approach the question of whether or not a rate is reasonable from an entirely different standpoint than does the commission. Before the court can declare that a rate is unreasonably low, it must clearly appear that it will yield less than the minimum return which invested capital has the right to demand. The court must and should in its deliberations exclude questions of public policy. * * * The commission is not a court, but a fact-finding body, charged with the duty of admin-

istering the law. In building up a rate the commission must necessarily take into consideration a great many factors. Many of these factors are indefinite and incapable of exact delimitation. To properly weigh these various factors requires long experience and much wisdom. * * * It would seem in Wisconsin that the present fair value of the property of a public utility could never exceed the price at which the public has a perpetual right to purchase it. If that is not wholly true, certainly the fact that the public has a perpetual right to purchase must be given great weight in determining the present fair value of the property. * * * Cost of reproduction now can be established only theoretically. Even in the case of a structure about to be erected, everyday experience fully confirms this. When applied to the property of a public utility, purchased under conditions which no longer exist and incorporated into the property of a public utility under circumstances that can not be reproduced, it is not only theoretical but highly speculative. The property of a public utility can not be valued as is other property, not devoted to the public use, which is subject to the laws of competition and therefore in an entirely different class. * * * After material is incorporated into a public utility plant, its value must be determined as a plant, not as material not so incorporated. For these reasons we consider that no great weight is to be attached to cost of reproduction new less depreciation under present conditions, and particularly so under the conditions that prevailed in 1921. * * * In determining the present fair value of a public utility operating under our public utility law, it is our view that justice as well as sound economic practice requires that controlling weight should be given in the valuation of the plant of a public utility to the investment cost where the investment has been prudently made."

A statement of the principle of valuation as based on the present value of the plant as a going concern is made by the court in *Erie v. Public Service Comm.*, 278 Pa. 512, 123 Atl. 471, P. U. R. 1924D, 89 as follows: "It is a matter of very common observation that cost does not indicate the value of property; nor does present value indicate original cost. Present value is the basis on which all bargains and sales are conducted, from the purchase of the smallest article to the sale of gigantic steel mills. It is the economic rule of equity of exchange. Original cost, long since lost sight of, is not the basis of bargain and sale, though it is considered in fixing the present value for a rate base. Original cost can not be used as a substitute for value.

* * * Present value is what we are now dealing with, and as to gas lands it includes at the time fixed such elements as depreciation, depletion, and the like. * * * If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. * * * Utilities are entitled to going-concern value where it appears in the evidence."

Going-concern value and good will as elements of valuation are clearly discussed in the leading case of *Des Moines Gas Co. v. Des Moines, Iowa*, 238 U. S. 153, 59 L. ed. 1244, 35 Sup. Ct. 811, P. U. R. 1915D, 577, as follows: "There is a great difference between such a plant and one whose business must be developed. All a purchaser of such a plant would have to do would be to take charge of the plant, 'touch the button,' and he is making money from the start. There is no element of uncertainty connected with it. He can retain its experienced employees as a rule, should he so desire, at the same wages. There is no question that such a plant has a 'going value,' because it is a money maker from the start. The only difficulty is to determine how much its 'going value' is worth. No interest during its construction is allowed, nor anything included in the 'overhead charges,' which are part of the physical value. But simply the fact that it has a developed business that will make money for its owner, with reasonable rates allowed for the product which it manufactures and sells. That 'good will' in the sense in which that term is generally used as indicating that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business, has no place in the fixing of valuation for the purpose of rate-making of public service corporations of this character, was established in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52, 53 L. ed. 382, 399, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034. * * * That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use. * * * Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property. In

this case, what may be called the inception cost of the enterprise entering into the establishing of a going concern had long since been incurred."

A valuation made several years previous to the time of fixing the rate, to which is added the cost of additions made since that time and an increase in the land values, is not proper or sufficient, because the present value of all the property, then being used in giving the service, must be ascertained and allowed in determining the proper rate base, as is indicated in the case of *Waukesha Gas & Electric Co. v. Railroad Commission*, 191 Wis. 565, 211 N. W. 760, for as the court said: "It appears from the commission's decision that it arrived at its valuation by taking that made in 1912 and adding thereto the costs of additions since made, by increasing the land value, and by adding cost of materials and supplies on hand plus working capital. See 13 W. R. C. 100, 22 W. R. C. 672 and 181 Wis. 281, 303, 194 N. W. 846. Some contention is made as to the amount of going value and working capital, but, as the case turns on the proper basis of valuation of tangible property, we do not reach these contentions. The valuation of the commission does not substantially reflect the increase in the value of any of plaintiff's property except its land. Original cost, reaching back over a period of more than ten years, plus cost of additions since made, is the main basis used for valuing plaintiffs' tangible property, except the land. This is not in accordance with the federal rule. *McCardle v. Indianapolis Water Co.*, 47 Sup. Ct. 144, 71 L. ed. 316. * * *

In the *McCardle* case a valuation made substantially like that of the commission in the present case was set aside by the court, because, in view of the great advance in prices during and after the war, it did not correctly reflect the actual value of the property as of the time the valuation is made, which is the date of the order fixing the rate and the probable value for some years to come. A valuation which does not as to the tangible property substantially reflect the then cost of reproduction less depreciation does not meet the requirements. The utility is entitled to the present fair value of its property as a basis for rate making. Hence, where there has been a period of rising prices for many years, original cost plus cost of additions do not correctly measure the present value. Such a method may form the main basis of a valuation during a period of fairly stable prices, but it does not as applied to prices from 1912 and earlier down to 1922. Since the basic result to be reached is the present and near future fair value of the property any method that will ac-

compish that result is a proper method. It is doubtful if any method will accomplish such result unless it substantially reflects or agrees with present or recent reproduction cost less depreciation. The method employed by the commission in the instant case does not do so, and under the federal rule referred to must be set aside as confiscatory and unreasonable."

§ 603. **Market valuation or capitalization inaccurate.**—That neither the capitalization nor the stock market valuation which fluctuates and is directly affected by rate regulation are proper measures of the actual valuation of the investment is indicated by the court in the case of *Spring Valley Waterworks v. San Francisco, California*, 124 Fed. 574, decided in 1903, as follows: "It is probably true that only a small part of the capital stock could be bought at this price. It is also true that the stock market is not always a safe guide to values. It may be influenced by considerations that do not affect the real value of the property, and in the present case it is alleged in the bill of complaint that the action of the board of supervisors in passing ordinances reducing water rates has caused the reduction in the value of the stock."

One of the most comprehensive decisions on this point is found in the case of *Des Moines Gas Co. v. Des Moines, Iowa*, 199 Fed. 204,¹⁰ decided in 1912, where the court said: "The 'good will' and that which the corporation enjoys as being the only source from which gas can be obtained is not an element of value on which profits should be earned in estimating whether the rates are remunerative or confiscatory."¹¹ * * * All concede that the present value is the basis on which returns are to be estimated."

Naturally the market value as fixed by the rate of return can not be considered, for to do so would be going in a circle, as the court indicated in *Charleston v. Public Service Comm.*, 95 W. Va. 91, 120 S. E. 398, P. U. R. 1924B, 601: "However, as we interpret those cases, the 'present fair value' for rate-making purposes does not mean the market value of the property as determined by the rate of return, or as based upon earnings when the reasonableness of the return or earnings is in question. If it does, then an increase in rates would increase the market value of the property, and that would again call for further increase.

¹⁰ Modified in *Des Moines Gas Co. v. Des Moines, Iowa*, 238 U. S. 153, 59 L. ed. 1244, 35 Sup. Ct. 811.

¹¹ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034.

This would recur again and again; rates increasing values and increased values requiring increased rates would follow each other, to avoid confiscation under the constitution. This vicious pyramiding would go on and on, until the point would be reached where the public would cease patronizing the utility rather than pay the price. The net result would be that the public would always be compelled to pay 'all the traffic would bear,' and governmental regulation of the prices to be charged would be at an end. Its only function in that respect would be to prevent discrimination."

That the current rate of return on the investment can not be considered as evidence to determine valuation is indicated in the decision of this court in the case of *Natural Gas Co. v. Public Service Comm.*, 95 W. Va. 557, 121 S. E. 716, P. U. R. 1924D, 346: "Generally speaking, evidence of value in a rate-making case can not be based upon the rate of return or earnings of the utility; and whenever this appears, either directly or indirectly, such evidence is incompetent. It is almost inconceivable that there could be an open market for these gas leaseholds, situated as they are, which would not be based upon the rates at which the utilities there are selling gas to the public."

That the capitalization of a small utility is of little or no value as evidence in its valuation is indicated in the case of *Okmulgee Gas Co. v. Corporation Commission*, 95 Okla. 213, 220 Pac. 28, as follows: "While there is no definite or invariable rule adhered to in determining value of public service property, and such value must be determined from proper and relevant testimony with the exercise of reasonable discretion by public utility commissions, yet a careful consideration of the authorities discloses that the rule is uniformly adhered to that the present value of the property used and useful in serving the public must be ascertained to a reasonable and definite extent in order to fix a reasonable and adequate rate to be charged by a public utility. * * * We believe it must be conceded in a small property, like the one under consideration, it seldom, if ever, has stocks or bonds upon the market, and its earning power depends entirely upon the rate authorized by the rate-regulating tribunal. Hence it is clear that the rate-making tribunal is practically reduced to the consideration of the original cost and reproduction new, less depreciation, to determine the reasonable value of the property."

§ 604. Present actual physical valuation as going concern.—
The case of *Des Moines Water Co. v. Des Moines*, Iowa, 192 Fed.

193, decided in 1911, furnishes a practical decision of this point where the court said: "What is the value of the plant today? There must be a reasonable rate of interest or dividends allowed on the value of the plant. If a concern is not profitable, the investors must lose their money. If the plant is a profitable one, then such profits can not exceed a reasonable rate of interest or dividend. * * * There can be no true test, other than the physical valuation, and to such physical valuation there may be added certain other items."

That the true valuation is the actual present value of the investment of the municipal public utility as a going concern is the effect of the decision in the case of Cedar Rapids Gas Light Co. v. Cedar Rapids, 144 Iowa 426, 120 N. W. 966, 138 Am. St. 299,¹² decided in 1909, for as the court said: "As said, the value of the system as completed earning a present income, is the criterion. In so far as influenced by income, however, the computation necessarily must be made on the basis of reasonable charges, for whatever is exacted for a public service in excess of this is to be regarded as unlawful. Save as above indicated, the element of value designated a 'going concern' is but another name for 'good will,' which is not to be taken into account in a case like this, where the company is granted a monopoly.¹³ * * * In ascertaining values in this way, the worth of a new plant of equal capacity, efficiency, and durability, with proper discounts for defects in the old and depreciation for use, should be the measure of value rather than the cost of exact duplication."

A practical discussion of the status of this question is to be found in the case of Roanoke Water Works Co. v. Commonwealth, 137 Va. 343, 119 S. E. 268, where the court said: "It seems superfluous to say that the true principles applicable in establishing rates to be charged by public service corporations have never been settled with anything approaching certainty and standardization. Public utility commissions and the state and federal courts have struggled with the subject of rate-making for years, under a general legislative plan by which the decisions of the commissions have been subject to a limited judicial review and control, with the result that no definite standards

¹² Affirmed in 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. 389, 48 L. R. A. (N. S.) 1025.

¹³ Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 91 N. W. 1081, affd. in 199 U. S. 600, 50 L. ed.

327, 26 Sup. Ct. 747; Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034.

have been fixed for the determination of either the rate base or the measure of return thereon. The subject involves inherent difficulties which up to the present time have baffled the best expert and judicial minds in their efforts to evolve a system sound and just in principle and uniform in application. The reported decisions upon the subject by rate-making bodies and by the courts are in a state of conflict and confusion. * * * However much difference of opinion there may be among the authorities generally as to whether the 'prudent investment theory' or the 'present value theory' ought to control in fixing the rate base, the parties to this litigation, the commission and this court, are in substantial accord upon the proposition that the present value theory is, upon the authority of the decisions of this court and the Supreme Court of the United States, the one which must control the decision in this case. This does not mean that the value of the property when determined is to be absolutely controlling, but that it is to be one of the chief elements in fixing the rates and charges. In determining such valuation 'proper consideration' (whatever that may mean) must be given to what would be the cost of a reproduction or replacement of the property (new), less a proper deduction for depreciation."

Valuations must be based on current costs of construction and material and a rate of return must be fixed on current money and investment values, as is indicated in the case of *Pabst Corp. v. Railroad Commission*, 199 Wis. 536, 227 N. W. 18, for as the court said: "The federal rule requires that the commission, in ascertaining the present value, shall give due consideration to the present-day cost of construction. It does not require that the value so fixed shall be, or even substantially agree with the reproduction cost, less depreciation, or that the reproduction cost shall be the controlling factor. It does not mean that either the original cost, or the present cost, or some figure arbitrarily chosen between those two, is to be adopted as the value. But it does prescribe that: 'To ascertain value "the present as compared with the original cost of construction" are, among other things, matters for consideration. * * * The weight to be given to such cost figures and other items or classes of evidence is to be determined in the light of the facts of the case in hand.' *McCardle v. Indianapolis Water Co.*, supra, page 410 of 272 U. S., 47 Sup. Ct. 148, 71 L. ed. 316. To the same effect, see *St. Louis & O'Fallon R. Co. v. United States*, 279 U. S. 461, 484, 49 Sup. Ct. 384, 387, 73 L. ed. 798, and cases cited there. * * * However, having adopted \$17,000,000 as the rate base, the commis-

sion found, and we think properly, that the city was fairly and reasonably entitled to a return of eight per cent. * * * It follows that the rate of seven cents per hundred cubic feet, plus the annual service charge of two dollars per meter, does not permit the city to earn an excessive return on the reasonable valuation of its water plant. * * * It follows that there was ample basis in reason for the conclusion of the commission that it was unable to determine that the rate schedule filed by the city is unjust, unreasonable, or unjustly discriminatory."

§ 605. **Franchise valuation.**—That the franchise and special privileges necessary to own and operate the municipal public utility are properly included in the true valuation as an actual investment which is the basis for fixing the rates to be charged for the service rendered is well expressed in the case of Spring Valley Waterworks Co. v. San Francisco, California, 165 Fed. 667, decided in 1908, where the court said: "He is entitled to a fair return, not always upon the cost of the property, because it may have cost too much; not always upon the outstanding indebtedness, because it may be in excess of the real value of the property; not always upon the total amount invested, because some portion of that which is acquired by the investment may be neither necessary nor presently useful for the public service but upon the fair present value of that which is used for the public benefit, having due regard always to the reasonable value of the service rendered. * * * The idea that a valuable franchise could be taken in condemnation proceedings, without compensation, would not be tolerated for an instant; and to permit such a franchise to be taken without consideration, indirectly, by means of rate regulation, is equally obnoxious to the federal Constitution. * * * It would seem from this that Spring Valley revenues have never been adequate to yield anything in excess of a fair return upon the capital actually put into the plant. There has been no income which might be credited as earnings to the franchise in addition to and above what is apparently a scant reward for actual capital invested. The conditions thus disclosed do not necessarily predicate unfair action by the board of supervisors. It may be that the water company itself has been extravagant, or that its investments have been larger than the needs of San Francisco demanded."

That franchise values should not be included in valuations when made for the purpose of rate regulation is well expressed by the court in the case of Consolidated Gas Co. v. Newton, 267

Fed. 231, P. U. R. 1920F, 483¹⁴: "If this case were *res integra*, I should not hesitate to refuse any valuation to the company's franchises. On principle the case is very clear. A franchise is a right to keep mains in the streets and furnish gas to the inhabitants of the city, and it is granted upon condition that the rates shall be controlled. If the franchise gets a value because the rates have not been controlled, the 'reasonable expectation' of their continuance is without basis, and that is the only possible ground for a vested interest in such rates. The action of the authorities in the past gives no prescription, and without such prescription the franchise can have no capital value, unless the very point is assumed. That the franchise has a kind of value is, of course, true enough; it alone protects the 'tangibles' from becoming junk; but as a part of the 'rate base' it should never figure."

This same court, in the case of *Brooklyn Union Gas Co. v. Prendergast*, 7 Fed. (2d) 268, P. U. R. 1926A, 412, reiterated the principle that in fixing a rate base, franchises, although property which represent no real cost to the company when acquired, should not be considered for that reason: "All this may be conceded; yet the general rule seems well established that, despite the fact that franchises are property for such purposes, no valuation upon the same should be included in the rate base beyond such amount as may have been paid for the same to the franchise granting power. * * * Nowhere have I been able to find authority for the proposition that, where a franchise obtained from the state shall have acquired great value as a result of its demonstrated earning power by way of operation thereunder, in rate cases such a franchise, although property, may in turn be given a value consistent with such earning power for the purpose of asserting a constitutional obligation to protect a capitalization based thereon."

While the company is not confined to the cost of the franchise rights, this is an element to be considered in fixing its present value, which is based upon the rights secured at the time the franchise was granted. This principle and its application is discussed as follows in the case of *Capital Water Co. v. Public Utilities Comm.*, 44 Idaho 1, 262 Pac. 863, P. U. R. 1928C, 473, where the court said: "The company therefore never having acquired any right, title, or interest in or to the Krall water right or to the Krall distributing system, the same could not properly be

¹⁴ Affirmed in 258 U. S. 165, 66 L. ed. 538, 42 Sup. Ct. 264.

considered as a part of the property of the company used and useful in its service to the public upon which it would be entitled to have a valuation placed for the purpose of rate making, and the commission was justified in finding and holding that the allegations of intervenor's complaint were fully sustained. * * *

The commission was right in refusing to value the water right upon the basis of the cost of storage water in Arrow Rock reservoir. It gives as a reason for such refusal that the water being diverted from Boise river and applied to a beneficial use upon the lands served by the canal of the company, at an early period of water appropriations from Boise river, gave to these lands under said canal a water right having such priority over later water rights on said river that the natural flow of the waters of Boise river is sufficient at all times to meet the demands upon it. * * *

Therefore, the value of the company's interest in this appropriation having been in the first instance acquired with priority from May 1, 1866, and such right to the use of this water having been subsequently maintained by virtue of its dedication to the beneficial use to which it has since been applied, manifestly these users can not now be made to pay a rental for such use, based upon what this right to the use of the water would now be worth if it were to be obtained from a new and independent source of supply, more than fifty years after the water right was acquired. * * *

But the company is entitled to have a valuation placed upon the water right, whether above or below the actual cost incurred with reference to obtaining the same, and, as already indicated, in determining this value, one of the elements of a rate base, we should be guided by what is said in *Wilterding v. Green*, 4 Idaho 773, 45 Pac. 134, *supra*, that a party using water appropriated for sale or rental has a perpetual right to such use, provided he pays a reasonable rate for the use of the same. * * *

The amount paid by the company for the water right would not determine its present fair value, but would be an element in fixing its present value. *Murray v. Public Utilities Commission*, 27 Idaho 603, 150 Pac. 47, L. R. A. 1916F, 756, *supra*. The commission erred, therefore, in holding that it would consider no other element of value of the water right than its actual cost to the company. * * *

The rule would seem to be that the sum necessary for working capital of a utility is addressed to the sound discretion of the utilities commission, and, in the absence of an abuse of discretion, such an allowance will not be set aside. * * *

In determining the value of the property so used the element of

going concern value no doubt received the consideration it deserved, and entered into and became a part of the company's property as value for rate-making purposes, which being true, the commission did not err in refusing to make any other or additional allowance as going concern value."

§ 606. Valuation limited to property being used for public.—By way of determining the proper rate on the "value of the property actually used and useful" in furnishing the service, the court, in the case of *San Diego Land &c. Co. v. Jasper*, 110 Fed. 702,¹⁵ decided in 1903, said: "It no longer is open to dispute that under the constitution 'what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.'¹⁶ That is decided, and is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses. We see no reason to doubt that the California statute means the same thing."

In adopting new processes or using new inventions to reduce the cost of producing the service, the valuation of the plant must include the cost of such patents providing the new process of production, and the value of property installed under such process; and property discarded or supplanted by the installation of new machinery or appliances can not be ignored. This principle is recognized in the case of *Pacific Gas & Electric Co. v. San Francisco*, California, 265 U. S. 403, 68 L. ed. 1075, 44 Sup. Ct. 537, where the court said: "Obviously, under the theory accepted below, appellant worsened its situation for rate-making purposes when it reduced the cost of manufacturing gas. Introduction of successful patented inventions enabled the public authorities to lower the rate base and gather all the benefits. The operating plant, made capable of producing gas at smaller cost, was declared less valuable than before. The result indicates error somewhere, either in theory or application of principle. * * * After adopting the reduced costs of manufacture for estimating net returns, the court gave no proper valuation to the inventions which caused the reduction, and thereby permitted property to be taken without just compensation. The amount of money actually paid to the inventors was not the proper measure of worth. Experience had demonstrated a much

¹⁵ Affirmed in 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. 571.

¹⁶ *San Diego Land &c. Co. v. National City, California*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804.

higher one; and to obtain the benefit of their use appellant sacrificed much. Installation of the inventions necessitated new outlay of money and abandonment of property theretofore valuable—both were necessary in order that the cost of manufacture might be reduced. If appellant's permissible profits depend upon the lowered cost, and it is denied adequate return upon property which made the reduction possible, or recompense for the obsolescence, successful efforts to improve the service will prove extremely disadvantageous to it."

Only property being used in giving service may be included in the valuation for rate-making purposes, as the court indicated in *Union Hollywood Water Co. v. Los Angeles*, 178 Cal. 206, 172 Pac. 983: "It is clear, moreover, that the trial court was not wrong in the exclusion of these 589 meters from its calculation in respect to the value of the plaintiff's working properties. These meters and other connections were idle at the time the valuations were made. They had never as yet come into use as a revenue producing part of the plaintiff's water system within said city. They were installed in advance of the actual necessity of their use, and there was no sufficient showing that they would be used during the year for which the rates were fixed, and the other water users and rate payers of the city should not be charged an additional amount, however small, in the way of a water rate in order to yield a return to plaintiff upon a species of property which was not in actual use as a part of its system, and which was yielding no return to plaintiff prior to the passage or taking effect of said ordinance."

While gas leases in developed territory may be valued for rate making at their present, and not their cost, values, leased territory not developed is not used and should not be included until developed and drilled for use, for as the court said in the case of *Logan Gas Co. v. Public Utilities Comm.*, 121 Ohio St. 507, 169 N. E. 575, P. U. R. 1930B, 246: "As to Class No. 1, the commission fixed the value thereon as \$7,880.62, holding that the actual cost of these leases to the company is the only value which should be used for rate-making purposes. We think this view ignores the value which should be attributed to property of the company, which is 'used and useful,' as provided by sections 499—8, 499—9, 614—20, 614—23, etc., General Code. We are of opinion that the value should have been determined by the commission rather than the actual cost of these leases to the company. This view requires us to reverse the holding of the commission on this point and remand for its further considera-

tion. * * * As to class No. 2 to wit, leases of tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but which do not have any producing wells drilled thereon, the majority of the court are of opinion that, while the leases upon territory of such character may in the future be 'useful,' the same do not come within the purview of the statute, which requires the property to be given valuation to be both 'used and useful.' "

While a public utility is entitled to a reasonable return on its property, which is being used in providing its service, a natural gas company may not include in such property lands which it retains under a lease at a small annual rental with an option to take gas if discovered in such a territory, because such property is not presently "used and useful" in providing its service. This principle is clearly established and discussed as follows in the case of *United Fuel Gas Co. v. Public Service Comm.*, 14 Fed. (2d) 209, aff'd. in 278 U. S. 322, 73 L. ed. 402, 49 Sup. Ct. 157: "So long as the plaintiff merely holds the lease—that is, retains the option to search for gas or oil without actually doing so—it pays a modest annual rent. Usually it may surrender this option at its pleasure, and thereby put an end to its obligation to pay rent for the future. On the other hand, if, at any time during the lease, gas or oil is obtained in a merchantable amount, the term of the lease is automatically extended for so long as it shall continue to flow in such quantities. So soon as the plaintiff begins to take either from the premises, it becomes under obligations to pay a fixed or percentage royalty, the amount of which is much greater than the rent payable during the period of the unexercised option. * * * These commissioners were unquestionably right in so far as they concluded that a fee-simple title to all the gas under a given acreage would be worth more, perhaps far more, than are mere rights to extract the gas under the same land when such rights are held under a thousand separate leases, containing varying terms and conditions expiring at different times, all calling for the payment of rents and royalties, and to prevent the lapse or forfeiture of some of which constant vigilance is required. * * * It is not easy to value plaintiff's gas holdings. As has been shown, every one of the various methods by which the plaintiff has attempted to do so is open to serious criticism. No one leaves upon the mind the conviction of certainty or finality. * * * The plaintiff, at a net cost of a few millions, acquired rights which it claims have now a value of upwards of thirty, and which it might be difficult

to deny were worth two-thirds of that sum. What proportion of this is presently used and useful in the public service? * * * Its right to relief is nevertheless absolutely dependent upon its being able to maintain the position that it is entitled to a fair return upon the present value of such of its property as is used and is useful in the public service. Whether it showed good judgment in acquiring and holding any other property is irrelevant to any issue upon which it here seeks a decree. No part of the gas which is supposed to be under the acreage classed as either probable or possible is 'used' in the public service or for that matter in any other, in any ordinary sense of that word. * * * The presumption against it is therefore strong, but on the other hand, it has something of apparent reasonableness about it, for West Virginia can not require plaintiff to sell its gas in the state if it can get a higher price elsewhere. *Pennsylvania v. West Virginia*, 262 U. S. 553, 559, 43 Sup. Ct. 658, 67 L. ed. 1117, 32 A. L. R. 300. If it be sound, there will be no need to seek a solution of a number of problems which are difficult or impossible to solve. At present we do no more than propound it, so that in the further proceedings in the cause, it may be given such consideration as it may merit, if indeed it be worth any at all. * * * Its expert witnesses we know say that it has 663,000,000 thousands of cubic feet still left. Even if they are right, it has already sold more than a third of all the gas it ever had, and they assert that on the 31st of December, 1923, its property was still worth nine times as much as they originally put into it. It is the story of the Sybilline books put into modern dress. * * * The fact that the commission has not seen fit to regulate its wholesale prices and has not interfered to prevent its discriminating among its wholesale customers, by selling to one at one price and to another at a very much higher or lower one, is immaterial. If, as it claims, the rates it is forced to allow its retail customers discriminate unfairly against its wholesale, the latter may have a right to complain, but it may not so long as in the aggregate it is getting a fair return upon all its property used and useful in the public service. * * * It follows that the total value of plaintiff's property of all kinds used and useful therein did not exceed \$11,251,499. As the plaintiff received from this part of its business an income sufficient to pay a return upon \$12,377,124.12, or \$1,125,624.12 more than the maximum worth of its property used therein, we can not hold that the commission erred in denying it an increase of rates."

§ 607. **Rate presumed reasonable—Effect of reduction on income.**—After observing that the court will always presume in favor of the sufficiency of the rate as prescribed to produce a fair return upon the value of the property necessary to furnish the service, the court, in the case of *Lincoln Gas &c. Co. v. Lincoln, Nebraska*, 223 U. S. 349, 56 L. ed. 466, 32 Sup. Ct. 271, decided in 1912, by way of a summary of the practical rules for determining the proper rate, observed that: "In this, as in every other legislative rate case, there are presented three questions of prime importance: First, the present reasonable value of the company's plant engaged in the regulated business; second, what will be the probable effect of the reduced rate upon the future net income from the property engaged in serving the public; and, third, in ascertaining the probable net income under the reduced rates prescribed, what deduction, if any, should be made from the gross receipts as a fund to preserve the property from future depreciation."

§ 608. **Elements of valuation as evidence of true value.**—The leading case on this question of finding the proper rate base is that of *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418,¹⁷ where the court after recognizing the difficulty of the question expressed the rule by saying: "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

¹⁷ Modified in 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. 888.

An interesting discussion of this principle and case is found in *Wisconsin-Minnesota Light & Co. v. Railroad Commission*, 183 Wis. 96, 197 N. W. 359, P. U. R. 1924C, 534, where the court said: "So far as we are able to discover, the statute has prescribed no rule of valuation, nor in any way limited nor even directed the commission as to the basis to be adopted in making its determination. * * * We know of no constitutional principles of valuation. It is not so long ago (*Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418; *Duluth Street Railway Co. v. Railroad Commission*, 161 Wis. 245, 152 N. W. 887), that the utilities were before the courts contending with great earnestness that investment cost was the proper method of valuation and the public authorities were claiming with equal earnestness and candor that cost of reproduction new less depreciation was the proper basis. The situation is now exactly reversed."

That neither original nor reproduction value but rather present value is the proper basis is reiterated in the case of *Joplin Gas Co. v. Public Service Comm. of Missouri*, 296 Fed. 271, P. U. R. 1924D, 137: "Under the rule of the Supreme Court that the present fair value of the property of a gas company used in the public service is to be taken as the basis for fixing reasonable rates, the company is entitled to such value, even though it has been increased as the result of enhanced war prices. Neither the original cost nor the present cost of reproduction is always a fair measure of the present value of the physical property of a gas company for rate-making purposes; but, where the plant has been in use for a number of years, an allowance must be made from either cost for depreciation. *City of Minneapolis v. Rand et al.* (C. C. A.), 285 Fed. 818."

An excellent extended discussion of the items of valuation and the theories of fixing them, including the element of depreciation and its relation to obsolete property and going value, is furnished in the case of *State v. Public Service Comm. (Mo.)*, 47 S. W. (2d) 102, where the court said: "The orders of the commission fixing the value of the company's property, the rate which it is allowed to earn on that property, and the rates to consumers, are prima facie reasonable and lawful, and the burden was upon the city to convince the trial court that the determinations, orders, etc., of the commission were 'unreasonable or unlawful.' * * * The hearing continued into 1928, when the value was continually rising, and the commission stated it was endeavoring to fix a value that would hold for a reasonable period in the immediate future. Rulings by the United States Supreme Court

authorize the consideration of that factor in determining value.

* * * If reproduction cost alone is resorted to as a rate base, it does not allow for differences of opinion. If there is conflicting evidence as to the value of the different items which entered into the reproduction cost, when the commission found the facts, it settled the value of each item and the total reproduction cost. It was then no longer a matter of opinion or of estimate. That cost was fixed. It is not the same thing as market value, value in use, investment value, about which opinions may differ, leaving room for a conclusion different from actual figures. If it is resorted to as the sole element of value, it becomes a fixed amount. There is no rule by which it may be increased or diminished, without taking cognizance of other elements of value. * * * It seems that the depreciation reserve should be sufficient, not only for maintenance and repairs, but also to equal the necessary depreciation by wear and not overcome by repairs or replacements. * * * Besides the wear and tear of the property from use, the ordinary accrued depreciation, there was accrued depreciation from total abandonment. * * *

This property so retired is no longer used, nor useful, nor property. Its fair value allowed in the Valuation Case [Report of Public Service Commission, Nov. 20, 1926] should have been determined and deducted in ascertaining present values. * * *

The abandonment of property which is never replaced, but is superseded by another instrumentality, as gas lamps by electric lights, or by another agency or company, is an extraordinary supersession. Its loss is 'one of the hazards of the game,' just as the extraordinary increase in values following the war was an unexpected gain allowed in the Valuation Case. * * *

While losing to electricity in those respects, it has no doubt found additional customers for cooking. Nevertheless, gas from powdered coal, the record shows, threatens to render obsolete its machinery for manufacturing its present gas. Common knowledge shows us that natural gas is a still more serious threat to render useless all its manufacturing plants. Could anything more certainly affect the going value of this utility?

* * * The company asked so large an allowance for depreciation reserve to offset its equipment as abandoned though not worn out, an accumulated fund which consumers would pay and which would add to the rate base, that it would thus artificially keep alive an earning capacity which the property itself did not possess. The practice would justify this general conclusion. The greater the earnings of a utility the higher the going value; the

higher the going value the greater the earnings at the same rate of return, with an excuse for further added going value. Thus we reach the vicious circle. The more the going value is increased the more it must be increased. * * * The city has not sustained the burden of showing that the rate of return is unlawful or so unreasonable as to authorize us to set it aside."

Present, rather than original or reproduction value, and current prices and wages, including those likely to prevail in the immediate future, is the proper method of determining the rate base and fixing a reasonable rate under a recent leading case. Operating charges, taxes, depreciation and a reasonable return on the investment actually used and useful in providing the service are all to be considered in fixing the reasonable return on the rate base. This principle and the various items to be considered in arriving at these results are found in the case of *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 71 L. ed. 316, 47 Sup. Ct. 144, P. U. R. 1927A, 15, where the court said: "But in determining present value, consideration must be given to prices and wages prevailing at the time of the investigation; and, in the light of all the circumstances, there must be an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future. In every confiscation case, the future as well as the present must be regarded. It must be determined whether the rates complained of are yielding and will yield, over and above the amounts required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service; that is, a reasonable rate of return on the value of the property at the time of the investigation and for a reasonable time in the immediate future. * * *

It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase. * * * The weight to be given to such cost figures and other items or classes of evidence is to be determined in the light of the facts of the case in hand. By far the greater part of the company's land and plant was acquired and constructed long before the war. The present value of the land is much greater than its cost; and the present cost of construction of those parts of the plant is much more than their reasonable original cost. In fact, prices and values have so changed that the amount paid for land in the early years of the enterprise and the cost of plant elements constructed prior to the great rise of prices due to the war do not constitute any real indication of

their value at the present time. * * * The validity of the rates in question depends on property value January 1, 1924, and for a reasonable time following. While the values of such properties do not vary with frequent minor fluctuations in the prices of material and labor required to produce them, they are affected by and generally follow the relatively permanent levels and trends of such prices. * * * The high level of prices and wages prevailing in 1922 and 1923 should be taken into account in finding value as of January 1, 1924, and in the years immediately following. Moreover, there is nothing in the record to indicate that the prices prevailing at the effective date of the rate order were likely to decline within a reasonable time—one, two, or three years—to the level of the average in the ten years ending with 1923. And we may take judicial notice of the fact that there has been no substantial general decline in the prices of labor and materials since that time. The trend has been upward rather than downward. The price level adopted by the commission—the average for ten years ending with 1921—was too low. * * * The commission in No. 6613 discussed the company's water rights. It said: 'Petitioner has acquired and now owns the right or privilege of taking and using all the water in White river and Fall creek for the purposes incident to its business. This right is an extraordinarily valuable part of the whole value of this property. * * * The value of these water rights must be included. *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 233 U. S. 454, 459, 58 L. ed. 1041, 1046, 34 Sup. Ct. 652. * * * The decisions of this court declare: 'That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use.' * * * Deducting \$135,000 for cash working capital, the amount included for water rights and going value is less than six per cent of the value of the physical elements as fixed by it. Having regard to the character of the system, that amount is clearly too low. * * * The commission's engineer made no appraisal of water rights or going value. The evidence is more than sufficient to sustain nine and one-half per cent for going value. And the reported cases showing amounts generally included by commissions and courts to cover intangible elements of value indicate that ten per cent of the

value of the physical elements would be low when the impressive facts reported by the commission in this case are taken into account. * * * The testimony of competent valuation engineers who examined the property and made estimates in respect of its condition is to be preferred to mere calculations based on averages and assumed probabilities. The deduction made in the city's estimate can not be approved. * * * And in No. 6613, the commission said: 'The canal appears to have been perfectly adapted to become a part of the water plant of the city. It intercepts the waters of White river near Broad Ripple. This is so far upstream that the source of supply has been free from the contamination arising from densely settled districts of the city for nearly half a century. * * * It saves the lift of millions of gallons of water daily from White river to the level of the filter beds. * * * The economic value of the canal is very large, when regard is given to the savings it effects, and the revenue it produces. * * * Its great value lies in the fact that it has never failed to do efficiently the work that must be done by some instrumentality of the water plant. * * * While some expressions of the district judge indicate that he was of opinion that dominant or controlling weight should be given to cost of reproduction less depreciation estimated on spot prices as of January 1, 1924, it is clear that the \$19,000,000 fixed by him as the minimum value could not have been arrived at on that basis. The commission's chief engineer testified that his estimate on prices as of that date was \$19,500,000. This was exclusive of cash working capital, water rights and going value. * * * Obviously, the cost of money to finance the whole enterprise is not measured by interest rates plus brokerage on bonds floated for only a part of the investment. The evidence is more than sufficient to sustain the rate of seven per cent found by the commission. And recent decisions support a higher rate of return. * * * And we are satisfied that the decree is right. As indicated above, a reasonable rate of return is not less than seven per cent. * * *

The evidence sustains an amount in excess of ten per cent to cover water rights and going value and also \$135,999 for cash working capital. On a consideration of the evidence, it is held that the value of the property as of January 1, 1924, and immediately following, was not less than \$19,000,000."

§ 609. **Current market price and rate of interest.**—That the valuation should be made contemporaneous with the fixing of the rate and that the proper test in determining the value is the

market price of the property upon which the current rate of interest is commonly regarded as a fair return and a proper basis for fixing the rate is the effect of the decision in the case of Consolidated Gas Co. v. New York, 157 Fed. 849, where the court said: "As to the realty, the values assigned are those of the time of inquiry; not cost when the land was acquired for the purposes of manufacture, and not the cost to the complainant of so much as it acquired when organized in 1884, as a consolidation of several other gas manufacturing corporations. * * * What the court should ascertain is the 'fair value of the property being used'¹⁸; * * * the 'present' as compared with 'original' cost; what complainant 'employs for the public convenience' (169 U. S. at page 547); and it is also the 'value of the property at the time it is being used.'¹⁹ * * * The value of the investment of any manufacturer in plant, factory, or goods, or all three, is what his possessions would sell for upon a fair transfer from a willing vendor to a willing buyer, and it can make no difference that such value is effected by the efforts of himself or others, by whim or fashion, or (what is really the same thing) by the advance of land values in the opinion of the buying public. * * * Indeed, the causes of either appreciation or depreciation are alike unimportant, if the fact of value be conceded or proved; but that ultimate inquiry is oftentimes so difficult that original cost and reasons for changes in value become legitimate subjects of investigation, as checks upon expert estimates or bookkeeping inaccurate and perhaps intentionally misleading."

On appeal the Supreme Court in the case of Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192, which reversed the preceding case on questions of the proper valuation of its franchise and the propriety of determining by actual experience the fact of the reasonableness of the rate before enjoining its enforcement, said: "And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made concerning rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. * * * Upon a careful consideration of the case before us we are of the opinion that the com-

¹⁸ Smyth v. Ames, 169 U. S. 446, 42 L. ed. 812, 18 Sup. Ct. 418, mod. in 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. 888.

¹⁹ San Diego Land &c. Co. v. National City, California, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804.

plainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the state of New York are in fact confiscatory. It may possibly be, however, that a practical operation under them might prevent the complainant from obtaining a fair return, as already described, and, in that event, complainant ought to have the opportunity of again presenting its case to the court."

A further definition of the rule by which to determine the proper rate for municipal public utility service is furnished by the leading case of *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260, decided in 1897, as follows: "Ordinarily, that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for. Then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, can not be said to be unreasonable."

The danger of considering the market price in so far as it is determined by rates of income is indicated in the case of *Natural Gas Co. v. Public Service Comm.*, 95 W. Va. 557, 121 S. E. 716: "Generally speaking, evidence of value in a rate-making case can not be based upon the rate of return or earnings of the utility; and whenever this appears, either directly or indirectly, such evidence is incompetent. It is almost inconceivable that there could be an open market for these gas leaseholds, situated as they are, which would not be based upon the rates at which the utilities there are selling gas to the public. * * * But, as the commission is not bound by any one method in ascertaining the fair value of a utility's property, neither is this court. It is the privilege as well as the duty of both to consider all available methods, all relevant facts, so as to arrive at a correct solution; to find what is fair to all. It is the duty of the commission as well as of this court to protect the utility as well as the public."

In determining the value of producing gas wells, which is especially difficult because of the uncertainty of the supply, the reasonable market value, where this can be established, has been adopted for rate-making purposes in Oklahoma, as is indicated in the case of *American Indian Oil & Gas Co. v. Poteau*, 108

Okla. 215, 235 Pac. 906, P. U. R. 1926A, 236, where the court said: "The production system of plaintiff in error consists of some 1,600 acres of leases, with ten or twelve gas wells, upon which the corporation commission fixed a total value of, in round numbers, \$78,000. Of this valuation plaintiff in error complains, and we find some difficulty in arriving at a conclusion as to a rule in fixing the value of producing gas wells on large acreage that will, in our judgment, be just and equitable to both parties. Evidence was introduced on both sides as to the original cost of the leases, the cost of drilling the wells, and the value of leases on adjoining property; but counsel have not favored us with citations of authorities from this court fixing the rule by which we are to arrive at the value of the production system of the plaintiff in error, and we therefore presume that the subject has not heretofore been definitely settled by this court, and we must look to other states for authorities on that subject.

* * * We can conceive of no better rule by which to fix the present value of the production system for rate-making purposes than to take its reasonable market value. This is what the corporation commission seems to have done. Plaintiff in error seeks to place a much higher value on both its producing system and distributing system than the corporation commission found, and much is said in briefs and arguments as to the amount of money spent, the plant's value as a going concern, etc.; but in view of the fact that the burden, in a measure, is upon plaintiff in error to prove that it is entitled to an increased rate, and, further, in view of the fact that the corporation commission found that plaintiff in error is receiving a reasonable return on the value of the property as found from the evidence by the corporation commission, we are not inclined to disturb the order, although the rate paid by the citizens of Poteau is an unusually low rate and the record shows that the investment has not been a profitable one, but the rate was agreed to when the franchise was voted and the present embarrassment has been brought about by the officers of the company themselves, and we feel that in equity and good conscience plaintiff in error should continue to furnish the gas at the rate prescribed in the order of the corporation commission until such time as it may be able to show by a preponderance of the evidence that a reasonable return can not, under good management, be earned at such rates."

This same court in a later case, in discussing a proper valuation for gas producing properties, observed that the burden of

proving this valuation was on the company, and indicated that the verified valuation for taxation purposes and the rate which the company had offered to furnish the gas under contract should be considered as evidence in determining the proper rate base and rate, for as the court said in the case of Pressure Oil & Gas Co. v. Tri-City Gas Co., 108 Okla. 248, 236 Pac. 41: "In arriving at a proper rate base to be adopted in establishing a city gas rate for the gas supplied the city of Chelsea, the corporation commission found it necessary to consider both the property used and useful of the Pressure Oil & Gas Company in transporting the gas thereto, and that portion of the property owned by the Unity Gas Company, and used in gathering and delivering the gas to the Pressure Oil & Gas Company in the field. * * * However, the evidence shows that its original cost was much less than steel pipe at the present time, and, while the original cost alone can not be considered a basis for fixing the value of the pipe line, we deem it not improper to refer to a statement made by Mr. Mason, the president of the company, which statement is a part of the record, and was made under oath by Mr. Mason in the annual return made by the Pressure Oil & Gas Company to the state auditor for use by that department in placing a value upon the company's property for taxing purposes for the year 1923, the pipe mentioned therein being the same property under consideration here, which statement is highly illuminative as to the origin and kind of pipe the line is composed of, and as to the company's opinion of its value when taxation instead of rate making is under consideration. For the purpose of taxation, the president, under oath, fixed the value thereon at \$12,047.13, and for the purpose of rate making, the engineers employed by the company to place a value thereon for rate-making purposes say it is worth \$80,821.37. * * *

We do not consider the findings and orders of the corporation commission as having the same weight and binding effect upon this court as the findings and judgment of a court in equity matters, or the verdict of the jury and judgment of the court thereon in law cases, but section 22 of article 9 of the Constitution of Oklahoma provides: '* * * That the action of the commission appealed from shall be regarded as prima facie just, reasonable, and correct * * *.' Therefore, since the burden is upon plaintiff in error to show by the evidence that the order made by the corporation commission is not just, reasonable, and correct, which, in our judgment plaintiff in error has failed to show, and in view of the fact that the corporation commission's

order permitted plaintiff in error to charge the same rate which it had offered to contract to furnish the gas, for, it is the opinion of this court that plaintiff in error can not be heard to complain, and we will, therefore, not disturb the order made by the corporation commission."

In determining market value, the commission may adopt in toto or consider as of the greatest value the price at which the plant was sold in an open market in an actual bona fide sale, as is indicated in the case of *Logan Gas Co. v. Public Utilities Comm.*, 124 Ohio St. 248, 177 N. E. 587, where the court said: "Believing that a system of valuation which rested so largely upon its own orders did not necessarily represent market value, it weighed all the evidence and reached the conclusion that the evidence of the value the original companies themselves placed upon the leases when dealing with each other, and to which valuation the present company agreed, was more convincing than the theoretical values testified to by the expert witnesses, and was the nearest approach to evidence of market value in the record, and arrived at the conclusion that the actual market value was slightly in excess of the value placed upon the leases in the transaction by the original companies, and by this company itself, where it had acted both as a willing seller and a willing buyer and had both sold and bought such leases."

That an element of valuation for rate-making purposes is the interest on money invested during construction is indicated in the case of *Mount Hope Bridge Co. v. Public Utilities Comm.*, 51 R. I. 218, 153 Atl. 367, P. U. R. 1931C, 57, where the court said: "In the valuation of public utilities for rate-making purposes, it is uniformly held that a part of the cost of the property devoted to public service is the interest on the money necessarily invested during the period of construction. * * * The original cost is made the basis of the purchase-price, if the state exercises its option; also the original cost is to be the fixed basis for the rate of tolls. The three items included in the original cost are the cost of the property, interest during construction, and a fixed limit, on a percentage basis, for organization and financial expenses."

The valuations must be contemporaneous with the fixing of the rate and must be based on prices and costs prevailing at that time and in the immediate future. The market value of securities has very little value as evidence because it is largely determined naturally by the rate of return on the investment; nor does capitalization as accurately indicate as it might.

the value of the plant, so that this item has doubtful value as evidence. The cost of laying mains is properly included in the investment, although this amount was deposited at the time with the company by prospective customers to whom it was to be returned when they began using the service. These elements of valuation and rate regulation are discussed and the principle established as follows in the case of Vincennes Water Supply Co. v. Public Service Comm. of Indiana, 34 Fed. (2d) 5, P. U. R. 1930B, 216, where the court said: "In arriving at his estimate Mr. Carter deducted the sum of \$18,328 from the cost of reproduction of the transmission and distribution system because of the presence of that amount of money deposited with appellant by the owners of real estate for whose benefit surface lines had been laid and installed before the property owners began to consume water. These deposits must be returned to the individual depositors as they later become users. Clearly deposits of such character are a liability, not an asset, and no part of invested capital, and should have received no consideration whatsoever in determining the value of appellant's property. Furthermore, Mr. Carter's estimate was of September 1, 1927, and the commission's order accepted his figures as of that date. Between that time and May 1, 1928, when the order became effective, additions and betterments were added to the plant of appellant amounting in the aggregate to \$33,830.10. Clearly this became a part of appellant's property which should have been taken into consideration in determining a rate base valuation effective May 1, 1928. * * * Values determined in former years will not aid in determining present values. Furthermore, the valuation of 1921 introduced by the appellant was clearly based upon a prior valuation determined in 1914. Yet there is no evidence as to appreciation of costs or of the decrease in the purchasing price of a dollar ever since said dates. It is common knowledge that such appreciation since 1914 has been tremendous. * * *

The language of the Utah public utilities commission in the case of *In re J. H. Perry*, Public Utilities Reports 1925E, 161, at 185, is pertinent in this connection: 'Such questions as capitalization and the amount and kind of securities and the market value of the same can have, in any event, only remote evidential value. In many instances, capitalization bears no particular relation to invested or present value, and the market price of securities depends upon the rates charged for service. If rates are lowered by regulatory bodies, the market value of securities will fall. If rates are raised, within reasonable limits, the value

of securities will rise. * * * To determine value from the purchase-price of stock at private sales is, as indicated above, to reason in a circle, for if rates charged be unreasonably low, the value of the property upon that basis is depressed; if unusually high, it is inflated. The test always is the present fair value of the property. * * * The items as to engineering costs, taxes, interest and interest during construction, legal expenses, and miscellaneous expenses are amply justified by the testimony of the various engineers. There can be no question as to the necessity of working capital in the management of any enterprise. * * * This going value has been fixed by various other courts at rates ranging from ten to twenty-five per cent of the value of the tangible properties. In our opinion the facts in this case indicate, as they did in the case of *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 47 Sup. Ct. 144, 71 L. ed. 316, that ten per cent of the value of the physical elements is low. * * * It has not been shown that there has been any expense in the financing, and if there has been none, none should be included. * * * We are of the conviction that the value upon which rates shall be fixed, including all proper items to be considered, and excluding the items not proper to be considered, is the sum of \$1,032,064, and that there should be a decree against the commission enjoining it from ordering any rates which will produce less than a proper return to the appellant. The parties have stipulated as to a proper rate, and the stipulation is in accord with the decision of the Supreme Court as to what is a proper return upon public utility properties."

§ 610. **Net earnings rule.**—The definition and the practical application of the so-called net earnings rule is furnished by a series of decisions of the Supreme Court of New York in connection with the subject of the taxation of the franchise of the municipal public utility. A brief summary of this rule is furnished in the case of *People v. Woodbury*, 203 N. Y. 231, 96 N. E. 420, decided in 1911, as follows: "The rule, in brief, is to ascertain the gross earnings of the corporation, and then deduct the operating expenses, together with the annual taxes paid. From the remainder, there should also be deducted a fair and reasonable return on that portion of the capital of the corporation which is invested in tangible property, the result becoming the net earnings contributable to the special franchise, which, when capitalized at a rate which I shall hereafter consider, becomes the value of the intangible property of the special franchise."

§ 611. **Limitations and additions necessary to this rule.**—A good definition, as well as a necessary limitation on the practical application of this rule, is furnished by the court in the case of *People v. State Board of Tax Comrs.*, 196 N. Y. 39, 89 N. E. 581, decided in 1909, as follows: "The net earnings rule contemplates a valuation upon the basis of the net earnings of the corporation which are attributable to its enjoyment of the special franchise. The method is thus applied: (1) Ascertain the gross earnings. (2) Deduct the operating expenses. (3) Deduct a fair and reasonable return on that portion of the capital of the corporation which is invested in tangible property. The resulting balance gives the earnings attributable to the special franchise. If this balance be capitalized at a fair rate, we have the value of the special franchise. * * * No corporation would be regarded as well conducted which did not make some provision for the necessity of ultimately replacing the property thus suffering deterioration; and we can not see why an allowance for this purpose should not be made out of the gross earnings in order to ascertain the true earning capacity. * * * While evidence as to what constitutes a fair and reasonable rate of return in the business of a corporation was received in this Consolidated Gas Co. case, 157 Fed. 849, 869, and may properly be taken by the court in certiorari proceedings under the tax law if parties see fit to offer it, the court may, in the absence of such evidence, adopt six per cent as a fair rate for the purpose of calculating the value of a special franchise under the net earnings rule. In valuing the tangible property of the relator, the land occupied by a portion of the plant was an important element to be considered. The referee allowed a return only upon the original cost of such land (\$25,162.01), instead of upon its present value (\$71,018.28)."

§ 612. **No constitutional right to unreasonable return.**—The court in the case of *Pocatello v. Murray*, 21 Idaho 180, 120 Pac. 812, decided in 1912, expressed the constitutional principle involved in the question of rate regulation by saying: "He has no vested right to charge an unreasonable or an unconscionable rate while exercising a franchise to serve a public use. To deprive a person engaged in such a public service of the power to charge and collect an unreasonable, extortionate, or unconscionable rate deprives him of no right, natural or acquired, and can not be the impairment of a contract within the purview and meaning of section 10, article 1, of the federal Constitution, nor

is it depriving him of property without due process of law, in violation of the Fourteenth Amendment."

A further accurate expression of the constitutional phase of the question is furnished in the case of *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631, decided in 1902, where the court said: "It is only where rates are made so unreasonable as to make the enforcement of the law establishing them equivalent to taking property for public use without just compensation that the federal courts hold that the corporation has been deprived of its property without due process of law, and has been denied the equal protection of the laws."

In the course of an exhaustive opinion the court in the case of *Appleton Waterworks Co. v. Railroad Commission*, 154 Wis. 121, 142 N. W. 476, 47 L. R. A. (N. S.) 770, Ann. Cas. 1915B, 1160, decided in May, 1913, held that: "Cost of reproduction must mean the cost which will be necessarily incurred by a reasonably prudent and careful man, using ordinarily careful business methods in reproducing a plant of equal efficiency. * * * For purchase purposes at least, the only expenses which should be considered in the estimate of the cost of reproduction are those which are reasonably necessary in a prudently conducted reproduction."

And further the court in the case of *Public Service Gas Co. v. Board of Public Utility Comrs.*, 84 N. J. L. 463, 87 Atl. 651, decided in July, 1913, observed that: "Every stockholder, past or present, in the Paterson and Passaic Gas and Electric Company must be assumed to have taken his stock with knowledge of the law, and the same knowledge must be imputed to every bondholder. He may have thought that the state would not exercise its power to his disadvantage, and have paid more for his stock on that account; but the state had done nothing to mislead him. If he depended on the state's inaction, he took the chance of its exercising its power, just as he took the chance of the company's being managed successfully. He acquired his stock not upon the basis of any assurance by the state that the then existing rates would continue, but upon his own estimate of the chances and the future value."

When the capital, actually invested, is made the basis of valuation by agreement of the parties, this is controlling, for as the court said in *Southwestern Tel. & T. Co. v. Houston, Texas*, 268 Fed. 878, P. U. R. 1921C, 222²⁰: "The rule is well established

²⁰ Affirmed in 259 U. S. 318, 66 L. ed. 961, 42 Sup. Ct. 486, P. U. R. 1922D, 793.

that rate-making bodies must allow such a rate to public service corporations as will yield a fair return upon a reasonable value of its property used for the public. * * * While under the general rule, and in the absence of any agreement to the contrary, both the cost of reproduction and the original cost must be considered in fixing present value, the present case is exceptional, in that, by the terms of the ordinance permitting the plaintiff company to purchase a competing telephone exchange in Houston, it is specifically provided that an increase of rates shall be permitted only when necessary to permit the company to earn a fair return, not upon the value of its property, but upon 'its capital actually invested in the Houston plant.' Thus, by the terms of its contract with the city, the telephone company has specifically waived its right to claim anything more than a fair return on its capital actually invested, which is the actual cost of the property."

That the public utility is only entitled to a reasonable return on the value of the property being used in providing the service, which does not include abandoned property or a substantial reserve account, unless this is actually used in the business, or the cost of cutting pavements unless actually incurred, or newspaper advertising expense in anticipation of legal proceedings in the case, is established and discussed as follows in the case of Columbus Gas & Fuel Co. v. Columbus, Ohio, 17 Fed. (2d) 630, P. U. R. 1927C, 639, where the court said: "On the other hand, the city claims that only such pavement as was cut at the time of original installation should now be carried in that value. The master's finding is in accord with the city's contention, and is correct. * * * Omissions from inventory, contingencies, administration, legal expenses, engineering, superintendents and inspection, taxes during construction, interest during construction. These items total seventeen per cent and were allowed by the master and are considered proper by the court. * * * Going-concern value has been a recognized element of value by the Supreme Court and inferior federal courts. * * * The master indicated, however, that, if any allowance at all were made, his judgment would dictate ten per cent addition for going-concern values. Such a percentage is considered fair and reasonable and is adopted. * * * The inspection method is entirely proper and decidedly preferable, where it can be effected. * * * 'Abandoned Mains.' * * * There is no claim that this property is used and useful in the business of the company. It should be entirely disregarded. * * * When it is remembered that the

property has been operated for a good many years with the bond issue outstanding, and presumably has paid dividends to its stockholders, and has accumulated a reserve account, as shown by its books, of over \$600,000, it is not easy to conclude otherwise than that the general public in Columbus has paid this indebtedness, and that it would be unreasonable and unfair to charge it against the future natural gas purchasing public.

* * * Except for the overhead cost of maintaining an executive, engineering, bookkeeping, and supervisory organization, which has heretofore received treatment, the master was correct in eliminating these various items of value. With the plan conceived by the company's engineers, creating a basic structure upon which to impress, attach, and superimpose every and all conceivable and imaginable items of cost, like barnacles on a ship's hull, the court is not in sympathy. * * * These expenses are for legal services and for advertising in newspapers in preparation and contemplation of this litigation. These were the original items of a continuous line of extraordinary expense attributable and chargeable to the trial of the instant case. The court is of the opinion that they are not allowable. Legal expenses in connection with rate cases have been given the stamp of approval by courts, when these expenses have been incurred in rate litigation before commissions and before courts. * * * There is a well-marked distinction between a return nonconfiscatory in character, and one which is fair in a commercial and economical sense. A rate of return may be all sufficient in fulfilling the demands of the Fourteenth Amendment to the Constitution of the United States, and at the same time fail in amount to encourage and justify the operation of a utility business under that degree of maximum efficient service to which the public is entitled. The former is a purely judicial question, while the latter is essentially legislative."

CHAPTER 25

REGULATION BY MUNICIPAL CORPORATIONS

Section	Section
615. Governmental power to regulate rates suspended by contract.	628. Rates subject to change by state if made without authority.
616. Municipal control practical and power delegated adequate.	629. Delegated power to fix rates binding until revoked.
617. Tendency to increase municipal control of real party in interest.	630. Statutory construction of power to regulate and fix rates.
618. Persistent enforcement of franchise essential.	631. Power to regulate rates not surrendered by implication.
619. Strict construction of contracts suspending power to regulate.	632. Rates fixed by contracts not clearly authorized held declaratory only.
620. Power to regulate and to fix rates by contract distinguished.	633. Strict construction saves right to regulate if rate not expressly covered.
621. Power to fix rates must be exercised in manner provided.	634. Right to regulate under reserved right to alter, amend, or repeal.
622. Power to regulate rates to be conserved.	635. Regulation continuing and akin to police power.
623. Rate regulation and general welfare.	636. Liberal construction holds contract binding on rates.
624. Power to fix rates may be delegated to municipality.	637. Delegated power to fix rates by contract or franchise limited thereby.
625. Policy of local control over purely local matters.	638. Contract giving consent and fixing rates valid.
626. Municipal authorities—Competency and authority to fix rates.	639. Fixing maximum rates permits regulation as to reasonableness.
627. Duty of municipality to prevent excessive rates.	640. Fixing rates not favored—Tends to create monopoly.
	641. Regulation of motor vehicles.

§ 615. Governmental power to regulate rates suspended by contract.¹—The power to control the municipal public utility, to regulate its service and to fix the rate therefor is essentially a power of government, the importance of which is becoming more generally recognized, is legislative or administrative in its character, continuing in its nature and capable of being delegated to

¹ This section (§ 498 of second edition) cited in *State v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799.

the municipality. When acting under such delegated authority, clearly conferred, the municipality has the power to fix the rate which may be charged for the service rendered by any municipal public utility by contract for a definite period of time which is not so unreasonable in its extent nor as to its terms and conditions as to constitute a clear abuse of such delegated authority amounting to fraud. The effect of such a contract, made in the exercise of duly authorized power, is to suspend the exercise by the government of the power to fix and regulate rates; and because of this effect the authority and the intention to make such a contract must be clearly apparent in order to preclude the state from regulating the rates.

§ 616. Municipal control practical and power delegated adequate.—Because of the great variety and varying conditions under which different municipalities provide for municipal public utility service a general statute of the state, attempting to regulate the service and fix the rate at which it should be furnished, could hardly be drawn which would be fairly and satisfactorily adaptable to the conditions of all municipal corporations in the state. As a matter of convenience and practical necessity the exercise of this power to fix rates and to permit of their modification to meet changing conditions with greater flexibility and with more specific reference to the conditions peculiar to any particular municipality has often been delegated by the states to the municipal corporations themselves, by express statutory enactment, especially under the doctrine of municipal home rule, where state commissions have only a limited jurisdiction over municipal control and regulation. Acting under such delegated authority or that conferred upon the municipality to give its consent to the maintenance and operation of the municipal public utility as the special franchise privilege permitting the furnishing of service upon such terms and conditions as the municipality sees fit to impose, the municipal corporation has the power of regulating the service and fixing the rates to be charged by any particular municipal public utility. Where the municipality has the right to grant the necessary franchise to the municipal public utility, permitting it to furnish its service, it may also protect itself and its inhabitants from unreasonable charges or inadequate service, and the very important duty devolves upon the municipal authorities in granting the special franchise privilege to the municipal public utility of exercising this power, thus vested in the municipality, and of safeguarding and protecting the public interest and that of the individual customer.

§ 617. **Tendency to increase municipal control of real party in interest.**—The power to regulate the service of municipal public utilities and to fix their rates, prior to state commissions, was conferred upon municipalities with greater frequency, not only for the reason that this permitted of its more convenient exercise, but because of the more extensive acceptance of the doctrine of the right of the municipality to exercise home rule in strictly local matters. Being of peculiar interest to the municipality affected, this plan should naturally secure the necessary attention to insure proper regulation and control. The necessity for regulation, due to the fact that the business is both a public one and a natural monopoly, is as imperative as the recognition of the right to regulate, for no matter how completely the principles of regulation may be established and the rules for arriving at the proper rate determined, unless the power to apply these principles of regulation and exercise the rules for ascertaining and imposing the proper rate is conferred upon an efficient responsible state or local body that will at all times conscientiously attend to their proper enforcement, the attention necessary to secure adequate service at reasonable rates may fail of realization in practice.

§ 618. **Persistent enforcement of franchise rights essential.**—The strict enforcement of the franchise rights and the vigorous application of the principles, defining what constitutes adequate service and reasonable rates, are as essential as that the proper franchise be drawn and the correct principles of regulation be established. The strict, persistent enforcement of the franchise rights and the accepted principles for the regulation of the service are among the most important duties devolving upon the state and municipal authorities for the municipality as well as for the municipal public utility itself, because both the consumer and the producer are interested in and directly affected by the proper determination of what constitutes adequate service and reasonable rates as well as in the proper enforcement of these rights.

§ 619. **Strict construction of contracts suspending power to regulate.**²—In the interest of the public, the statutory grants to municipalities of the right to make long-time contracts for public utility service binding on the public and to fix the rate to be charged for the service are not favored because they tend

² This section (§ 502 of second edition) cited in *State v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799.

to suspend the right to regulate the service and to modify the rates as changing conditions permit or justify, which, but for the existence of such a contract, would always be available, so that such statutory grants as well as the contracts made pursuant to their provisions are strictly construed. And only in those cases where the right absolutely to fix rates is conferred upon the municipality will the state be held to have relinquished its power to enact further laws and continue to regulate the rates, so that where no sufficient authority has been given to the municipality to make such a contract and thus to suspend the right to adjust rates for the period fixed by its terms, the right of the state to interfere for the purpose of regulating the service and modifying the rates in the interest of the public is not abrogated. In such cases the contract of the municipality for the service of municipal public utilities is made and held subject to the right of the state to exercise its paramount authority by virtue of its governmental power to fix rates. Where this power has not been surrendered by the state it is in effect only suspended by the making of such a contract by the municipality until action is taken by the state, just as state legislation is superseded by congressional regulation of interstate commerce or of any matter over which the federal government also has jurisdiction.

§ 620. Power to regulate and to fix rates by contract distinguished.³—As the legislature has the power to delegate authority to the municipality to regulate service and to fix rates, it also has the power to revoke such authority and to regulate directly or through another agency or its own commission, and only in those cases where the authority, delegated to the municipality, clearly confers upon it the power to agree upon a fixed rate for a definite period which the municipality expressly does by contract, is the state precluded at any time from regulating the service and readjusting the rates. On the other hand, where the state has clearly authorized the municipality to contract for the service of municipal public utilities and to fix the rate for a definite period, the contract of the municipality, made pursuant to such authority, can not be set aside by the state. The authority to regulate the service and the rate to be charged for it when conferred upon the municipality enables it to exercise the governmental power of regulating charges as well as the service,

³ This section (§ 503 of second edition) cited in *State v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799.

but does not authorize it to enter into a contract to abandon the governmental power itself. The authority to exercise the governmental power of regulation and to determine from time to time what constitutes reasonable rates does not authorize the municipality to contract for service and to fix a definite rate which can not be readjusted from time to time as changing conditions, including the cost of the service, would justify.

§ 621. **Power to fix rates must be exercised in manner provided.**—And where the right conferred upon the municipality to fix the rates for the service furnished by municipal public utilities is to be exercised in a certain manner as by contract or franchise, the municipality can not exercise the power in any other manner; and in such cases an ordinance attempting to regulate or readjust rates in any other way than that provided by the statutory provision would be clearly invalid and of no effect with reference to a municipal public utility, which had already received a franchise from the municipality which did not fix the rate or retain in the municipality the power to regulate it. The power to prescribe rates by contract or to specify them in a franchise is very different from the legislative or governmental power to regulate rates from time to time, nor does the power to regulate the manner of constructing the municipal public utility plant in the streets of the municipality include the authority by which the municipality may fix the rates to be charged for it.

§ 622. **Power to regulate rates to be conserved.**—Where, therefore, a contract is entered into between a municipality and a municipal public utility for the providing of its service at a fixed rate and the municipality has not been clearly authorized to make such a contract, it only constitutes a declaration of a reasonable rate which may be modified by action of the state or the municipality pursuant to authority conferred upon it for this purpose by the state. The power conferred upon the municipality by the state to contract for municipal public utility service does not necessarily include the power to fix the rates for the service for the entire period of the contract; and where authority to fix rates for a fixed period is not clearly conferred upon the municipality, its contract attempting to do so is not binding and the rates so fixed may be readjusted and another rate fixed, provided it is a reasonable one. It is often expedient for the municipality not to fix a definite rate, but to leave the matter open so that it may be determined from time to time as the increase of business or any other factor, reducing the cost of the service, may enable the company to reduce the rate. The

right to regulate rates should remain open and always be a continuing one and not be exhausted by its exercise in the first or any subsequent instance; for it is in the interest of the public as well as of justice that this right be exercised from time to time whenever necessary to avoid the continuance of inadequate or excessive rates on the part of the municipal public utility.

§ 623. **Rate regulation and general welfare.**—Indeed, this matter of determining the proper rate for the necessary service of such public utilities as water, light and transportation so intimately affects the health, welfare and comfort of the citizens as to bring it within the scope of the police power of the city, because if the rates are unreasonably high they will be prohibitive to a certain class which will be denied or seriously restricted in the enjoyment of an adequate water service which in turn might seriously impair their health, and by unduly restricting the service of other necessary utilities, would materially interfere with the comfort and welfare of the citizens and especially the poorer and more dependent classes. This power to regulate the service and the rate to be charged for it in connection with its police and other general powers, reserved to the municipality, is a continuing one, and while it may not be exercised arbitrarily and unreasonably to the oppression of the municipal public utility, justice and the interests of all parties in the end require that the right of regulation remain free and untrammelled so that it may be exercised at any time when the interests of the public or the company demand it because of changed conditions controlling the cost of furnishing the service, and it is well established that the law assures a reasonable rate even against governmental regulation.⁴

⁴ United States. *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48; *San Diego Land & C. Co. v. National City, California*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804; *Knoxville Water Co. v. Knoxville, Tennessee*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. 531; *Peoples Gas Light & C. Co. v. Chicago, Illinois*, 194 U. S. 1, 28 L. ed. 851, 24 Sup. Ct. 520; *Interstate Consol. St. R. Co. v. State of Massachusetts*, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. 26, 12 Ann. Cas. 555; *Murray v. Pocatello, Idaho*, 226 U. S. 318, 57 L. ed. 239, 33 Sup. Ct. 107; *Wyandotte County Gas Co. v.*

State of Kansas, 231 U. S. 622, 58 L. ed. 404, 34 Sup. Ct. 226; *Russell v. Sebastian*, 233 U. S. 195, 58 L. ed. 912, 34 Sup. Ct. 517, L. R. A. 1918E, 882, Ann. Cas. 1914C, 1282; *Des Moines Gas Co. v. Des Moines, Iowa*, 238 U. S. 153, 59 L. ed. 1244, 35 Sup. Ct. 811, P. U. R. 1915D, 577; *Detroit United R. Co. v. Detroit, Michigan*, 248 U. S. 429, 63 L. ed. 341, 39 Sup. Ct. 151, P. U. R. 1919A, 929; *Southern Iowa Elec. Co. v. Chariton, Iowa*, 255 U. S. 539, 65 L. ed. 764, 41 Sup. Ct. 400; *Paducah, Kentucky v. Paducah R. Co.*, 261 U. S. 267, 67 L. ed. 647, 43 Sup. Ct. 335, P. U. R. 1923C, 309; *Opelika, Alabama v.*

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ings Gas Co., 55 Mont. 102, 173 Pac. 799, P. U. R. 1918F, 768.

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New Mexico. Agua Pura Co. v. Las Vegas, 10 N. Mex. 6, 60 Pac. 208, 50 L. R. A. 224; Gallup v. Gallup Elec. Light &c. Co., 29 N. Mex. 610, 225 Pac. 724; City Elec. Co. v. Albuquerque, 32 N. Mex. 397, 258 Pac. 573; Albuquerque v. City Electric Co., 32 N. Mex. 401, 258 Pac. 574.

New York. People v. Willcox, 196 N. Y. 212, 89 N. E. 459; People v. Willcox, 207 N. Y. 86, 100 N. E. 705, 45 L. R. A. (N. S.) 629; People v. Western New York &c. Trac. Co.,

214 N. Y. 526, 108 N. E. 847; *Quinby v. Public Service Comm.*, 223 N. Y. 244, 119 N. E. 433, 3 A. L. R. 685, P. U. R. 1918D, 30; *Rochester v. Rochester Gas & C. Corp.*, 233 N. Y. 39, 134 N. E. 828, P. U. R. 1922C, 793; *Murray v. New York Tel. Co.*, 170 App. Div. 17, 156 N. Y. S. 151, P. U. R. 1916E, 289, 1916F, 1017, *affd.* in 226 N. Y. 590, 123 N. E. 879; *New York v. Interborough Rapid Transit Co.*, 232 App. Div. 233, 249 N. Y. S. 243, P. U. R. 1931E, 161, *affd.* in 257 N. Y. 20, 177 N. E. 295, P. U. R. 1931E, 278; *Public Service Comm. v. Hurtgan*, 91 Misc. 432, 154 N. Y. S. 897, P. U. R. 1916A, 547; *Public Service Comm. v. Fox*, 96 Misc. 283, 160 N. Y. S. 59, P. U. R. 1916E, 1051; *Public Service Comm. v. Mt. Vernon Taxicab Co.*, 101 Misc. 497, 168 N. Y. S. 883, P. U. R. 1918C, 320; *Niagara Gorge R. Co. v. Gaiser*, 109 Misc. 38, 178 N. Y. S. 156, P. U. R. 1921C, 636; *United Trac. Co. v. Smith*, 115 Misc. 73, 187 N. Y. S. 377, P. U. R. 1922A, 643; *Syracuse v. New York State Rys.*, 189 N. Y. S. 763, P. U. R. 1922E, 703; *New York v. Citizens Water Supply Co.*, 189 N. Y. S. 929, P. U. R. 1922E, 376, *affd.* in 191 N. Y. S. 430, P. U. R. 1922E, 375, 376; *New York State Rys. v. Rochester*, 195 N. Y. S. 783, P. U. R. 1922E, 667; *Rizzo v. Douglas*, 201 N. Y. S. 194; *Borland v. Curto*, 201 N. Y. S. 469.

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Newark Nat. Gas & C. Co. v. Newark, 92 Ohio St. 393, 111 N. E. 150, P. U. R. 1916F, 1033, *affd.* in 242 U. S. 405, 61 L. ed. 393, 37 Sup. Ct. 156, Ann. Cas. 1917B, 1025; *Interurban R. & Terminal Co. v. Public Utilities Comm.*, 98 Ohio St. 287, 120 N. E. 831, 3 A. L. R. 696, P. U. R. 1919B, 212; *Cleveland Tel. Co. v. Cleveland*, 98 Ohio St. 358, 121 N. E. 701, P. U. R. 1919C, 136; *Mutual Elec. Co. v. Pomeroy*, 99 Ohio St. 75, 124 N. E. 58; *Ohio River Power Co. v. Steubenville*, 99 Ohio St. 421, 124 N. E. 246, P. U. R. 1920D, 1034; *Link v. Public Utilities Comm.*, 102 Ohio St. 336, 131 N. E. 796, P. U. R. 1921E, 72; *State v. Court of Appeals*, 104 Ohio St. 96, 135 N. E. 377, P. U. R. 1923E, 270, 571; *East Cleveland v. Board of Education of City School Dist.*, 112 Ohio St. 607, 148 N. E. 350; *Lorain St. R. Co. v. Public Utilities Comm.*, 113 Ohio St. 68, 148 N. E. 577, P. U. R. 1926A, 649; *Nelsonville v. Ramsey*, 113 Ohio St. 217, 148 N. E. 694; *Cannon Ball Transp. Co. v. Public Utilities Comm.*, 113 Ohio St. 565, 150 N. E. 39, P. U. R. 1926C, 564; *Cincinnati Trac. Co. v. Public Utilities Comm.*, 113 Ohio St. 618, 150 N. E. 81; *Cincinnati v. Public Utilities Comm.*, 113 Ohio St. 689, 150 N. E. 48, P. U. R. 1926C, 694; *Coney Island Motor Bus Corp. v. Public Utilities Comm.*, 115 Ohio St. 47, 152 N. E. 25, P. U. R. 1926E, 284; *East End Trac. Co. v. Public Utilities Comm.*, 115 Ohio St. 119, 152 N. E. 20, P. U. R. 1926D, 642; *Board of Education v. Columbus*, 118 Ohio St. 295, 160 N. E. 902; *Western Reserve Steel Co. v. Cuyahoga Heights*, 118 Ohio St. 544, 161 N. E. 920; *Ohio Elec. Power Co. v. State*, 121 Ohio St. 235, 167 N. E. 877; *Cleveland v. Gustafson (Ohio St.)*, 180 N. E. 59; *Lake Shore Elec. R. Co. v. State (Ohio St.)*, 180 N. E. 540; *Hocking Glass Co. v. Ohio Light & C. Co.*, 11 Ohio App. 80, 29 O. C. A. 265, *affd.* in 63 Bull. 473, 16 O. L. R. 364; *Columbus v. Ohio State Tel. Co.*, 13 Ohio App. 232, 29 C. D. (39 C. R.) 297, 28 O. C. A. 102, *affd.* in 103

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Oklahoma. South McAlester-Eufaula Tel. Co. v. State, 25 Okla. 524, 106 Pac. 962; Pioneer Tel. & T. Co. v. State, 33 Okla. 724, 127 Pac. 1073; Pawhuska Oil & Co. v. Pawhuska, 47 Okla. 342, 148 Pac. 118; Pawhuska v. Pawhuska Oil & Co., 64 Okla. 214, 166 Pac. 1058, *error dis.* in 250 U. S. 394, 63 L. ed. 1054, 39 Sup. Ct. 526, P. U. R. 1919E, 178; Sapulpa v. Oklahoma Nat. Gas Co., 79 Okla. 196, 192 Pac. 224, P. U. R. 1921A, 138; Bartlesville v. Corporation Commission, 82 Okla. 160, 199 Pac. 396, P. U. R. 1921E, 509; Moomaw v. Sions, 96 Okla. 202, 220 Pac. 865; Huffaker v. Fairfax, 115 Okla. 73, 242 Pac. 254; Western Oklahoma Gas & Co. v. Duncan, 120 Okla. 206, 251 Pac. 37, P. U. R. 1927C, 277; Hominy Light & Co. v. State, 130 Okla. 258, 267 Pac. 235, P. U. R. 1928D, 743; St. Louis-San Francisco R. Co. v. Andrews, 137 Okla. 222, 278 Pac. 617; Cushing v. Consolidated Gas Utilities Co. (Okla.), 284 Pac. 38; Jones v. Blaine (Okla.), 300 Pac. 369; *In re Consolidated Gas Utilities Co.* (Okla.), 11 Pac. (2d) 473.

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v. McMinnville, 130 Ore. 309, 274 Pac. 118, 280 Pac. 504, P. U. R. 1929C, 346; Moss v. Peoples California-Hydro-Elec. Corp., 134 Ore. 227, 293 Pac. 606; Fenwick v. Klamath Falls, 135 Ore. 571, 297 Pac. 838; Union Service v. Portland (Ore.), 298 Pac. 919.

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(2d) 157; Tillery v. McLean (Tex. Civ. App.), 46 S. W. (2d) 1028; McCutcheon v. Wozencraft (Tex. Com. App.), 255 S. W. 716, affd. in McCutcheon v. Wozencraft, 116 Tex. 440, 294 S. W. 1105; Ex parte Sullivan, 77 Tex. Cr. 72, 178 S. W. 537, P. U. R. 1915E, 441; Ex parte Parr, 82 Tex. Cr. 525, 200 S. W. 404; Ex parte Polite, 97 Tex. Cr. 320, 260 S. W. 1048; Ex parte Luna, 98 Tex. Cr. 458, 266 S. W. 415.

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Virginia. Virginia-Western Power Co. v. Clifton Forge, 125 Va. 469, 99 S. E. 723, 9 A. L. R. 1148, P. U. R. 1919E, 766; Richmond v. Chesapeake & Potomac Tel. Co., 127 Va. 612, 105 S. E. 127, P. U. R. 1921C, 46; Victoria v. Victoria Ice, Light &c. Co., 134 Va. 134, 114 S. E. 92, 28 A. L. R. 562, P. U. R. 1923A, 465; Portsmouth v. Virginia R. & Power Co., 141 Va. 44, 126 S. E. 366; Longs Baggage Transfer Co. v. Burford, 144 Va. 339, 132 S. E. 355; Thompson v. Smith, 155 Va. 367, 154 S. E. 579.

Washington. Seattle v. Hurst, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169; City Cab, Carriage &c. Co. v. Hayden, 73 Wash. 24, 131 Pac. 472, L. R. A. 1915F, 726, Ann. Cas. 1914D, 731; Seattle Elec. Co. v. Seattle, 78 Wash. 203, 138 Pac. 892; Seattle Taxicab &c. Co. v. Seattle, 86 Wash. 594, 150 Pac. 1134; Hadfield v. Ludin, 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942; State v. Public Service Comm., 101 Wash. 601, 172 Pac. 890, P. U. R. 1918E, 277; State v. Home Tel. & T. Co., 102 Wash. 196, 172 Pac. 899, P. U. R. 1918E, 288; Puget Sound Trac., Light &c. Co. v. Grassmeyer, 102 Wash. 482, 173 Pac. 504, L. R. A. 1918F, 469; State v. Kuykendall, 117 Wash. 406, 201 Pac. 777; State v. Olympia Light

§ 624. **Power to fix rates may be delegated to municipality.**—A leading case dealing with the question of the regulation by the municipality, acting under authority delegated to it by the state, of the municipal public utility service and the determination of what constitutes a reasonable rate, together with the fixing of the rate determined upon by the municipality, is that of *San Diego Land &c. Co. v. National City, California*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804, decided in 1899. In the course of its opinion the court said: "That it was competent for the state of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use, and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county or town, or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted."

Under proper statutory authority, a municipal corporation may fix the rate for its water service without objection on the part of a taxpayer where the rate is self-sustaining and even profitable, and there is no rule of uniformity applicable to it as in matters of taxation, so long as the classification for the service is reasonable, in view of the nature and extent of the service, for as the court said in *Alford v. Eatonton*, 174 Ga. 169, 162 S. E. 495: "Under the legislative grant * * *, the city of Eatonton is empowered to operate its system of waterworks,

&c. Co., 91 Wash. 519, 158 Pac. 85; *Monroe Water Co. v. Monroe*, 135 Wash. 355, 237 Pac. 996; *Comfort v. Penner* (Wash.), 6 Pac. (2d) 604.

West Virginia. *Benwood v. Public Service Comm.*, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261; *Bluefield v. Public Service Comm.*, 94 W. Va. 334, 118 S. E. 542, P. U. R. 1924A, 158; *Combs v. Bluefield*, 97 W. Va. 395, 125 S. E. 239.

Wisconsin. *State v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108; *Manitowoc v. Manitowoc & Northern Trac. Co.*, 145 Wis. 13, 129 N. W. 925, 140 Am. St. 1056; *Milwaukee Elec. R. &c. Co. v. Railroad Comm.*, 153 Wis. 592, 142 N. W. 491, L. R. A. 1915F, 744, Ann. Cas. 1915A, 911, affd. in 238 U. S. 174, 59 L. ed. 1254, 35 Sup. Ct. 820; *State v. Milwaukee Elec. R. &c. Co.*, 169 Wis. 183, 172 N. W. 230, P. U. R.

1919E, 282, 295; *Oshkosh v. Eastern Wisconsin Elec. Co.*, 172 Wis. 85, 178 N. W. 308; *Milwaukee Elec. R. & Light Co. v. Milwaukee*, 173 Wis. 329, 181 N. W. 298, P. U. R. 1921D, 310; *West Allis v. Milwaukee*, 180 Wis. 512, 193 N. W. 360, P. U. R. 1923E, 584; *State v. Washburn Water Works Co.*, 182 Wis. 287, 196 N. W. 537; *Walworth v. Chicago, Howard &c. R. Co.*, 190 Wis. 379, 208 N. W. 877; *Pabst Corp. v. Milwaukee*, 193 Wis. 522, 213 N. W. 888, 215 N. W. 670, P. U. R. 1928B, 503; *Madison v. Railroad Commission*, 199 Wis. 571, 227 N. W. 10, P. U. R. 1930A, 499; *Milwaukee v. Milwaukee Elec. R. &c. Co. (Wis.)*, 237 N. W. 64; *Milwaukee v. Railroad Commission (Wis.)*, 240 N. W. 165; *South Shore Utility Co. v. Railroad Commission (Wis.)*, 240 N. W. 784.

not only for the purpose of using water for municipal purposes, such as the flushing of sewers, the extinguishing of fires, the laying of dust upon its streets, etc., but it may also operate said waterworks for such profit as may be, in the judgment of the municipal authorities, right and proper in the conduct of the municipal affairs of the city. The price at which the city furnishes water to its customers is not in any sense a tax, so far as appears from the allegations of the petition. The question of uniformity in taxation is therefore not presented. There appears no city regulation which requires any customer to use water from the waterworks owned by the city. The price fixed by the city for its water affects no citizens except those who desire to purchase water from the city. Those who do not wish to use the water supplied by the city, so far as the allegations of the petition are concerned, have the right to cease buying water from the city. There is no allegation that the city is losing money in the operation of the waterworks which may thereby impose upon taxpayers liability to increased ad valorem taxes upon their property within the city limits. On the contrary, the petitioners allege that the city is making large profits upon their waterworks system. The plaintiffs failed to set forth any cause of action, and the court properly dismissed the petition."

§ 625. Policy of local control over purely local matters.—Under the power delegated to the municipality by the state to regulate the use of its streets and the service rendered by the municipal public utility, the municipality as the local agency of the state enjoys extensive power of regulation and control by virtue of which the responsibility of securing for itself and its inhabitants adequate service at reasonable rates is imposed upon it, for as the court in the case of *Owensboro, Kentucky v. Cumberland Tel. & T. Co.*, 174 Fed. 739, decided in 1909, said: "That power to permit the use of highways and streets for such purposes must reside somewhere is obvious. Primarily, it resides in the legislature of each state, but, as is well known, is almost universally delegated to the municipality concerned. Reasons of convenience, as well as theories of local rule in strictly local matters, lead us to expect that the local government has the power to regulate the use of its own streets. * * * If, then, such a use is within the general objects and purposes to be served by the power of opening and maintaining public streets, why is the grant of a right to so use the public streets an act beyond the powers of the municipal legislature? What power is delegated by the express power to 'regulate' the streets and alleys of the

city? Manifestly, something was meant by the power to 'regulate.' The word 'regulate' imports the power to control the use of the streets, and is indeed a word of wider import than 'control' or the power to 'consent' to an easement of way."

That the municipality providing public utility service may fix the rate therefor independently of the Colorado state commission as a matter of local policy is indicated in the case of *Holyoke v. Smith*, 75 Colo. 286, 226 Pac. 158: "On principle it would seem entirely unnecessary to give a commission authority to regulate the rates of a municipally owned utility. The only parties to be affected by the rates are the municipality and its citizens, and, since the municipal government is chosen by the people, they need no protection by an outside body. If the rates for electric light or power are not satisfactory to a majority of the citizens, they can easily effect a change, either at a regular election, or by the exercise of the right of recall."

That the policy of local control obtains as to the use of streets by motor vehicles operating therein as common carriers is well expressed in the case of *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404: "The requirement that persons operating motor vehicles upon the street for hire furnish security to indemnify persons suffering injury by reason of the misuse of the license to use the streets through his negligent conduct of his business has been approved in a number of instances. * * * In the instant case there are no facts shown indicating that there is an unfair classification. All motor vehicles operated for hire are, as above stated, under similar regulations in the city of San Antonio. Nor is it apparent from the record that the license fee is unduly onerous, nor that the requirement of the indemnity is so difficult to comply with as to be unreasonable, nor that the terms of the indemnity are not reasonable. The presumption that they are reasonable is not rebutted upon the face of the ordinance, nor by evidence attacking it."

A municipality, acting under proper statutory authority, may regulate the use of its streets and the service rendered by public utilities, using them for profit. These regulations may cover matters of traffic and the proper use of the streets in the interest of the public generally and for the protection of all forms of street traffic. Reasonable regulations of such matters will be sustained in the absence of their regulation by the state, for as the court said in the case of *Omaha & Council Bluffs St. R. Co. v. Omaha*, 114 Nebr. 483, 208 N. W. 123, P. U. R. 1926D, 629: "The right to use the public highways of the state by the ordin-

ary and usual means of transportation is common to all members of the public without distinction, and extends to those engaged in the business of carrying passengers or freight for hire by such ordinary and usual means of transportation, as well as to individuals pursuing a strictly private business, subject to the power of the state, by legislative enactment, to impose reasonable and impartial regulations, upon such use, which power may be delegated by the legislature to the governing bodies of municipal corporations. * * * It follows, therefore, that the terms of the ordinance in controversy in this action must be construed, not as a grant, but as a regulation of a right pre-existing. * * * The conclusion follows therefore that, the ordinance in controversy, properly construed, being a regulatory enactment, and not a grant, the rights conferred can not be denominated a franchise. * * * Nor do we find this ordinance vulnerable to the objection that the provisions thereof are in excess of the powers now possessed by the cities of metropolitan class. * * * A general construction of the terms of the charter in the light of this decision leads to the conclusion that the ordinance in question is within the powers conferred upon the mayor and council. Indeed, if this ordinance be given full force and effect, it does no more than afford to the traveler a regular and certain service, between definite termini by competent and careful drivers, in vehicles properly constructed and maintained and operated under the rules established to promote safety for a definite consideration, with the added assurance that responsibility for the results of negligence of the driver or proprietor is secured. The enactment of this ordinance thus appears to be within the reasonable exercise of the powers granted by the charter involved, and to constitute merely the adoption by the proper authorities of a measure deemed by them to be necessary for the accommodation and protection of strangers and the traveling public in person and in property. So considered, the ordinance in question is valid, and the district court for Douglas county erred in enjoining the enforcement thereof, and its judgment is reversed and the action dismissed."

That municipal corporations under proper statutory authority, may regulate the operation of public utilities within their limits, even where the service is interstate in its extent, over purely local matters, involving the proper use of their streets, is indicated as follows in the case of Cannon Ball Transportation Co. v. Public Utilities Comm., 113 Ohio St. 565, 150 N. E. 39, P. U. R. 1926C, 564, where the court said: "It is not necessary in this

connection to inquire whether all of these matters properly appear in the record, but it is quite certain that enough appears to indicate that it was an interstate operation which was desired, and that that portion of the interstate operation within the state of Ohio is wholly within the corporate limits of the city of Ironton. It is of course proper and necessary that the operations within the state of Ohio should be regulated, but it is apparent that the public utilities commission of Ohio does not have the power of such regulation. By virtue of the amendment (111 Ohio Laws, p. 19) to section 614-84, General Code, which became effective June 14, 1925, such jurisdiction was removed from the public utilities commission by reason of the entire operation being within the corporate limits of the city of Ironton, and such jurisdiction now rests with the municipal authorities of Ironton."

This same court in a later case indicated that a municipality has the power, under proper statutory authority, to make charges for its public utility service liens against the property served. In upholding the power of municipal control over such local matters, the court in the case of *Bucyrus v. Sears*, 34 Ohio App. 450, 171 N. E. 256, said: "The plaintiff city, owner and operator of its own waterworks, having furnished water to a tenant of the defendant, R. Sears, who failed to pay the water charges, now seeks to enforce the charge against the real estate of the defendant. The right to do so is claimed by the city under and by virtue of sections 3956, 3957, and 3958, General Code. * * * In our examination of the cases digested, we find a line of authorities without conflict, upholding the right of municipalities to make water charges and light charges for service furnished by city plants a lien against the property supplied. In the case of *City of East Grand Forks v. Luck*, 97 Minn. 373, 107 N. W. 393, 6 L. R. A. (N. S.) 198, 7 Ann. Cas. 1015, and cited in the brief for the city, a review of many of the cases is had, and the various objections to such procedure by a municipality are ably answered, both by the argument of the learned judge who rendered the opinion, and by the cases cited by him."

That a municipal corporation may regulate traffic in the interest of safety for the benefit of its inhabitants by the establishment of safety zones is generally recognized as is indicated in *Cleveland v. Gustafson*, 124 Ohio St. 607, 180 N. E. 59: "In approaching this case, the court appreciates that it is on the border line. In other words, it is a 'close case.' The court below invokes the 'rule of reason,' and we shall use it here, as it

is a good rule. Increasing population, and an increase in the means and methods of travel, present to our legislative bodies their most complex problems. * * * Complaint is made that a safety zone is a nuisance, in that it places an obstruction in the highway. It certainly is not an abuse of power for council to reasonably obstruct the highway, if it is necessary so to do to make it safe."

That, in the interest of public safety and as a matter of local traffic regulation, the municipality is generally recognized as having the power, if indeed it is not under the duty, of establishing and maintaining stop signs for traffic which must be recognized and complied with by the traveling public under penalty of damages for a failure to do so, is well expressed as follows in the case of *Comfort v. Penner* (Wash.), 6 Pac. (2d) 604: "As has been stated, the stop sign has been maintained at that corner of the intersection for nearly two years prior to this collision. It was a sign of warning, and one which all automobile drivers would be expected to obey and others approaching the intersection would expect them to obey. * * * It was maintained for the safety of traffic. Travelers upon public highways are not expected to first ascertain and determine whether such signs are established in strict compliance with law before respecting them. * * * The safety of traffic, by the growth of unforeseen congestion in certain areas, may, and often does, demand some additional municipal regulation of traffic not found in the state statutes. The power to so regulate by local authorities is contemplated by our statutes. So that it is immaterial whether this Admiral way was defined as an arterial street or highway or not. It was marked as a danger zone by the stop sign."

The right to conduct a private business on public streets or highways is neither an inherent nor vested one, and, when granted by the state or municipality, is subject to proper regulation and control and to reasonable restrictions imposed on account of local traffic conditions in the interest of the general public, for as the court said in the case of *Chapman v. Portland* (Maine), 160 Atl. 913: "The validity of this general delegation of police power and the exercise of it by the municipality, within proper limits, is not and can not be questioned. The citizen has a constitutional and common-law right to travel and transport his property by motor vehicles over the public highways, including the streets of a city, and, subject to statutory or municipal regulations, has the right to make a reasonable use of such

vehicles in the business of carrying passengers or freight for hire. This right to conduct a private business on the public highway, however, is not inherent or vested, but is in the nature of a special privilege which the state, or municipality under its delegated power, may either condition, restrain, extend, or prohibit. *Buck v. Kuykendall*, 267 U. S. 307, 45 Sup. Ct. 324, 69 L. ed. 623, 38 A. L. R. 286; *Packard v. Banton*, 264 U. S. 140, 44 Sup. Ct. 257, 68 L. ed. 596; *State v. Barbelais*, 101 Maine 512, 64 Atl. 881; *Burgess v. Brockton*, 235 Mass. 95, 126 N. E. 456. The city of Portland undoubtedly, in the exercise of its delegated police power, is authorized to limit the number of public vehicle stands upon its streets and fix their location, or even to prohibit them altogether, to the end that, without undue impairment of the public hackney service, traffic congestion may be prevented and the safety and convenience of public travel promoted.

* * * Carefully analyzed, the power here delegated to abutting owners is only to modify the general prohibition of the ordinance and remove restrictions which otherwise remain absolute. The plaintiff may be benefited by the modification. He can not be deprived by it of any constitutional or property right. Failing to show that he is or can be injured by the operation of the regulation, he has no reason or right to be heard in an attack upon its constitutionality. *Cusack Co. v. Chicago*, 242 U. S. 526, 37 Sup. Ct. 190, 61 L. ed. 472, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 Sup. Ct. 359, 58 L. ed. 713."

§ 626. **Municipal authorities—Competency and authority to fix rates.**⁵—The leading case of *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48, decided in 1884, indicates that for many years the right has commonly been conferred upon municipalities to control the service and to regulate the rates of municipal public utilities in California and that the municipal officers are competent to exercise such right, although the municipality receiving the service is a party to the relation, because their action is official, for as the court said: "Long before the constitution of 1879 was adopted in California, statutes had been passed in many of the states requiring water companies, gas companies and other companies of like character, to supply their customers at prices to be fixed by the municipal authorities of the locality; and, as an independent proposition, we see no reason why such a regulation is not within the scope of

⁵ This section (§ 509 of second edition) cited in *Kalamazoo v. Circuit Judge*, 200 Mich. 146, 166 N. W. 998.

legislative power, unless prohibited by constitutional limitations or valid contract obligations. Whether expedient or not is a question for the legislature, not the courts. It is said, however, that appointing municipal officers to fix prices between the seller and the buyers is, in effect, appointing the buyers themselves, since the buyers elect the officers, and that this is a violation of the principle that no man shall be a judge in his own case. But the officers here selected are the governing board of the municipality, and they are to act in their official capacity as such a board when performing the duty which has been imposed upon them. Their general duty is, within the limit of their powers, to administer the local government and, in so doing, to provide that all shall so conduct themselves and so use their own property as not unnecessarily to injure others. They are elected by the people for that purpose, and whatever is within the just scope of the purpose may properly be entrusted to them at the discretion of the legislature."

This well-established principle of the right of municipal officers, under proper authority to exercise the power of regulating the rates to be charged for municipal public utility service, has never been questioned except by the court in the case of *Agua Pura Co. v. Las Vegas*, 10 N. Mex. 6, 60 Pac. 208, 50 L. R. A. 224, decided in 1900, which evidently overlooked the decision in the case of *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48, *supra*, as well as a number of decisions sustaining it, for in the course of its opinion, denying the power of the legislature to delegate the right to regulate rates to a municipality, which is generally permitted, the court said: "Among the numerous cases involving this question of regulation, in various forms, which have been arising under the state and federal courts, we have been referred to none, nor are we aware of any such, in which a delegation by the legislature of power to regulate rates, in matters of this and similar nature, to a subordinate authority, which was itself interested as a purchaser or consumer, has been upheld."

§ 627. Duty of municipality to prevent excessive rates.⁶—Indeed, some of our courts have decided that in the absence of statutory authority it is the duty of the municipality to protect its inhabitants in the matter of municipal public utility service by requiring that such service be rendered at reasonable rates,

⁶This section (§ 510 of second edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125 Va. 469, 99 S. E. 723, 9 A. L. R. 1148.

for as the court in the case of *Long Branch Comm. v. Tintern Manor Water Co.*, 70 N. J. Eq. 71, 62 Atl. 474, decided in 1905, said: "But, independent of such statutory provision, I think it is the province and the duty of the municipality, whenever opportunity offers, to exercise its power in the protection of its inhabitants against extortion, and to secure them a supply of water and of gas from corporations, assuming to furnish those commodities, at reasonable rates. The water company is exercising a public franchise, which, from its nature and mode of exercise, is necessarily, during its continuance, a practical monopoly, and it follows beyond all question that its charges for its supply must be reasonable. And it would be strange indeed if the municipal government, which, so to speak, imposes this monopoly upon its citizens, were powerless to protect them against unreasonable charges."

§ 628. Rates subject to change by state if made without authority.⁷—Where the municipal public utility is required to secure consent of the municipality before installing its plant and furnishing its service, the municipality, having the power to grant its consent on such reasonable conditions as it sees fit, may stipulate as to the rates to be charged for the service rendered. Unless, however, the municipality is specifically empowered to fix the rate for the service rendered by contract and thereby suspend the exercise of the governmental power to regulate rates during the period of the contract, the rates so fixed may be changed by the state in the exercise of its governmental power of regulation, and the contract of the municipality fixing the rates without authority conferred upon it by the state continues only until suspended by action on the part of the state or a commission selected by it fixing another and different rate, for as the court in the case of *Manitowoc v. Manitowoc & Northern Trac. Co.*, 145 Wis. 13, 129 N. W. 925, 140 Am. St. 1056, decided in 1910, said: "Inasmuch as the city might on any terms refuse its consent to the use of its streets by interurban cars, we see no reason why it might not exact any conditions it saw fit, provided they were not unlawful in themselves, and as to the parties to the contract there was nothing unlawful about the conditions we are considering. * * * That the legislature of the state might expressly empower cities to make such contracts as the one in question is well settled. In passing such an ordinance as

⁷ This section (§ 511 of second edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125

Va. 469, 99 S. W. 723, 9 A. L. R. 1148.

we have before us, a city, proceeding under a grant of power specifically conferred, acts as the agent of the state, and the public is concluded by the contract during its life, and its obligations could not be impaired by subsequent legislative actions, unless it were held that the ordinance was part of the charter of the railway company and subject to amendment or repeal under section 1 of article 11 of our Constitution. Otherwise, a state may, in matter of proprietary rights, exclude itself and authorize its municipal corporations to exclude themselves from the right of regulating rates. * * * Statutes granting to the cities the right to make long-time contracts binding on the public, and fixing a rate to be charged by a public service corporation, are not looked upon with favor, and will be strictly construed. It is only where the right is very clearly conferred that the state will be held to have relinquished its power to enact laws regulating tolls. * * * No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent and to this extent only is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting section 1862 or section 1863, Statutes 1898, the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act. * * * The railroad commission has made no determination in the case before us; at least, if it has, it is no part of the record. Until that determination is made, the contract is in force. When it is made, the contract is superseded, if the rate is changed."

A municipal ordinance prohibiting the use of some of its streets, which are necessary for motor vehicles serving other municipalities of the state, will be set aside as arbitrary and unreasonable for the reason that, while the municipality may reasonably regulate the use of its streets, it can not prohibit their use by a public utility, acting under state authority in rendering a service throughout the state. This principle is established, and the reasons for its application are well illustrated in the case of *Arlington v. Lillard*, 116 Tex. 446, 294 S. W. 829, where the court said: "The city of Arlington passed an ordinance which prohibits the use of Abrams and Division streets, from the west boundary line of the city limits to the east boundary line of the city, by those engaged in the operation of

motorbuses or motor vehicles for hire, and provided a penalty for its violation. * * * Appellees brought this suit in the district court of Tarrant county for an injunction to restrain the enforcement of the ordinance. * * * Appellees alleged Abrams and Division streets are the only streets or thoroughfares which can be used by them in traveling from Fort Worth and other points west of Arlington through the latter city to Dallas and other points east of Arlington; that there are no other ways through Arlington over which they may travel; and that a denial of the use of Abrams and Division streets prevents them from passing through the city, which affects and interferes with their use of the state highway between Fort Worth and Dallas and intermediate points. That such a prohibition and denial does affect and interfere with their use of the state highway, not only through the city of Arlington but outside of and beyond that city's limits, is fairly evident. A clear statement of the issue, which we have attempted, makes it readily apparent that the power is one that can not be exercised by municipal corporations. * * * Its effect is extraterritorial, and, furthermore, if not directly inconsistent with the general laws of the state, is at least indirectly violative of and inconsistent with the general policy of the state in permitting the use of the highways of the state by those transporting passengers and freight for hire. The state has not prohibited the use of the highways of the state, which include the streets of cities, to carriers of passengers and freight for hire, and for a city to deny them the use of such streets within its limits as will prevent them from passing through the city effects a denial of the use of the highways outside of the city and those which approach the city from any direction. This is the exercise of a power of the general government, and one in its nature which can not be delegated to cities. For this reason, as well as for others, this exercise of the power by the city of Arlington is inconsistent with those legislative enactments, general in their nature, pertaining to the highways of the state and their use by the citizens of the state and others, including those carrying passengers for hire."

Municipal consent for the installation of public utility equipment is limited to considerations of the general welfare of the state, which will not permit a municipality to refuse a public utility, operating in a number of cities throughout the state, the right to install its equipment and operate its system within the limits of such municipality. The matter of regulating rates between municipalities and rural districts in the interest of the

welfare of the whole community or state, in order that the rate as well as the service may be generally uniform, depending on conditions in each locality and the cost of rendering the service, is subject to regulation and control by the state, for as the court said in the case of *Parker-Young Co. v. State*, 83 N. H. 551, 145 Atl. 786, P. U. R. 1929E, 160: "This act clearly confers upon the commission the exclusive power, subject to appeal, to find whether the public good requires that a petitioning utility shall be permitted to engage in business and allowed to construct its lines in any city or town; and by consequence to determine to which of two or more competing utilities the grant of such rights will best subserve the public good. Like power invested in local town officers would be inconsistent with the power here expressly bestowed on the commission. * * * It is inconceivable that the legislature could have intended that the commission's permission to a public utility to do business in a given territory could be annulled by obstructive action by a local board in any one of the several towns through which the utility has been authorized to extend its lines. Such a result would defeat the apparent purpose of the legislature to provide for uniform treatment and control through a single state tribunal of utilities operating in several municipalities. * * * The difference in the cost of service as between the smaller and larger development is in dispute. * * * The extent to which the maximum good of each must yield to that of the whole, and what difference in rates should bar the granting of service to the greater number, are pure questions of fact for the tribunal which for the time being is passing on the question. Upon this issue the trier may consider the prevailing tendency of the time, supported by public policy, to equalize or apportion so far as reasonable the advantages as between rural and urban sections and to promote the growth and prosperity of the whole community involved; but against the advantage to the former must be weighed the cost to the latter, if it be substantial. Whether such equalization or apportionment is for the public good under the circumstances is a question of fact."

§ 629. Delegated power to fix rates binding until revoked.²—Where, however, the state does confer authority upon the municipality by clearly empowering it to contract for the service

² This section (§ 512 of second edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125 Va. 469, 99 S. E. 723, 9 A. L. R. 1148.

of municipal public utilities and to fix the rate for the service, such a contract when executed pursuant to the authority so delegated to the municipality is a valid obligation which can not be impaired by action on the part of the state in changing the rate fixed in such a contract, although the authority may be revoked at any time by a repeal of the statute granting it, which would terminate the power of the city to contract for such service at a fixed rate, for as the court in the case of *Los Angeles City Water Co. v. Los Angeles, California*, 88 Fed. 720, decided in 1898, said: "The power of the city of Los Angeles to agree upon water rates, I think, is fairly implied in the power 'to provide for supplying the city with water,' and therefore falls within the second class of powers enumerated by Judge Dillon. * * * This delegation of power to the city was not, of course, a relinquishment by the legislature of its control over the subject. The legislature could at any time revoke the power delegated to the city, and provide directly, through agencies of its own selection, for supplying the city with water, provided such revocation or provision should not impair any previously vested rights."

That the power to contract includes the power to fix and limit rates for public utility service is well stated in the case of *University Place v. Lincoln Gas & Electric Light Co.*, 109 Nebr. 370, 191 N. W. 432, P. U. R. 1923B, 789, as follows: "By section 1708, Compiled Statutes 1909, the city of University Place, as a city of the second class, was authorized to grant a franchise to and make a contract with any person, company, or association for the privilege of granting to such person, company or association the furnishing of light for the streets, lanes, alleys and other public places and property of said city and the inhabitants thereof. * * * The question, therefore, is whether there is a contract the obligation of which would be impaired by the proposed action of the gas company. * * * The power to contract may be said to be an attribute of the person or individual, while the power to regulate is an attribute of sovereignty. * * * We are of the opinion that in determining whether the fixing of a maximum rate in the ordinance in question was within the competency of the parties, particularly the city, we are not required to follow the strict rules of interpretation or construction which apply to a delegation of strictly governmental powers—the power conferred is to contract, not to govern; and although the contract has the effect to suspend for a time the governmental power to regulate rates, when it exists, this does not affect its validity, if the time limit be reasonable, and the power to enter into the

contract is found. * * * Our attention has not been called to any case where the power to contract for a supply of water, gas or other similar necessity, has been granted, the authority to fix a maximum rate has been denied, except *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. ed. 679, 21 Sup. Ct. 493."

That the city may by contract fix rates which will obtain until revoked by the state is reiterated in the case of *Victoria v. Victoria, Ice, Light & Power Co.*, 134 Va. 134, 114 S. E. 92, 28 A. L. R. 562, P. U. R. 1923A, 465, as follows: "The overwhelming weight of authority is to the effect that a municipality, in the absence of any direct regulation of rates by the state, may enter into a contract with a public utility whereby the rates to be charged for service to the public are fixed, which contract, as between the parties themselves, is binding. The state nevertheless has power which it may delegate to a commission to change such rates whenever, because of changed conditions, such rates are no longer reasonable. Franchise rate contracts, unless clearly authorized by the state, are such contracts as may be changed by the state without infringing the constitutional guaranty.

* * * Again there is authority to the effect that, while franchise contracts as to rates may have been valid when made, the city, as one of the contracting parties, was only acting as agent of the state, and, as principal the state may at any time waive any of its rights therein. This has been held in *Salem v. Salem Water Co.*, 255 Fed. 295, 166 C. C. A. 465, P. U. R. 1919C, 956, and by the state courts in Delaware, Idaho, Indiana, Maine, Massachusetts, New Jersey, New York, Oregon and Washington. Note, 3 A. L. R. 742."

This principle of the power of the municipality to fix and regulate rates even after the enactment of the public service commission law is reiterated in the case of *Baton Rouge Waterworks Co. v. Louisiana Public Service Comm.*, 156 La. 539, 100 So. 710: "We find that the power to supervise, regulate, and control the waterworks company and to fix rates was specifically and unmistakably granted to the city of Baton Rouge by its legislative charter. * * * We are unable to see how language could be used which would be more specific and positive and at the same time be more comprehensive and all-embracing. The authority to provide an adequate water supply manifestly includes the power to do and to perform everything incident thereto and necessary to attain that object. * * * Our conclusion is, therefore, that the city of Baton Rouge, at the time of the adop-

tion of the Constitution of 1921, was vested with the power to regulate, supervise, and control the Baton Rouge Waterworks Company, and to make rates to govern the water supplied by the said company, and this power was not withdrawn nor affected by anything said in the constitution conferring similar powers on the public service commission, but was expressly reserved to the said city."

Until revoked, the city acting under delegated power may fix rates, for as the court said in *Sumter Gas & Power Co. v. Sumter, South Carolina*, 283 Fed. 931⁹: "Since the state legislature did not in express terms confer upon the municipality the power to make an irrevocable contract as to such rates, any rate fixed by such contract was subject to regulation under the police power of the state. * * * Therefore the ordinance of the city granting the use of the streets for gas mains with conditions as to rates to be charged, accepted, and acted upon by Rieha, in whose favor the franchise was granted, became a contract binding on both parties, subject to the exercise by the state of its police power to regulate rates. Since the state has not undertaken to exercise its right to alter the rates contracted for, they are still binding on both parties and are beyond the control of the court."

That rate regulation by the city was revoked by the statute creating the public service commission is pointed out in the case of *Benwood v. Public Service Comm.*, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261, as follows: "Though the grant and acceptance of the franchise wherein certain rates were fixed, created a contract between the water company and the city of Benwood, the rates thereby fixed are nevertheless cognizable for revision by the public service commission under the broad powers delegated thereto, unless prior to the delegation of those powers the legislature had expressly delegated power to the city of Benwood which authorized the city to contract inviolably for the rates mentioned in the franchise for the period stated therein. Rate making is a legislative act. It is inherent in and belongs primarily to the legislature. The rate-making power is a power of government—a police power of the state. * * * For a municipal corporation to claim the power to fix rates inviolably, it must show clear and express delegation of the same to it from the legislature. * * * We do not say that the contract as

⁹ Stipulation and motion to remand granted in 266 U. S. 639, 69 L. ed. 482, 45 Sup. Ct. 11, with di-

rections to district court to dismiss bill without prejudice.

to rates contained in the franchise was not good as between the water company and the city as long as the legislature did not exercise its superior and supreme power over the subject of the rates. From the general powers to establish waterworks and to contract and be contracted with, impliedly the city had the power to contract in the matter of rates for water furnished the public as long as the legislature did not exercise its reserved power in that particular. But that implied power was inferior to the reserved power. It was subject to the right of the legislature to prescribe different rates at any time."

To the same effect the courts of the state of Washington in the case of *State v. Home Tel. & T. Co.*, 102 Wash. 196, 172 Pac. 899, P. U. R. 1918E, 288, decided: "A different situation is presented by the fixing of rates in the franchise from that which arises in those cases where after the granting of the franchise, the city has attempted to fix rates. * * * In other words, after the passage of the Public Service Commission Law, the city no longer had any power in regard to rates charged by appellant, but the rates already provided for in the franchise remained in effect until the public service commission had taken some action regarding them. The mere filing of a new schedule of rates was insufficient to establish that schedule as a basis for appellant's charges for service such as is demanded by the relator in view of the provisions of section 43. * * * The city of Spokane having had the power to fix the rates in the appellant's franchise, and having done so, and the public service commission not having as yet assumed jurisdiction, as provided in section 43 of the Public Service Commission Law, it follows that relator was entitled to the installation of the telephone at the rate provided in the franchise, and the superior court was correct in issuing the writ prayed for."

Where a municipality has the power to regulate rates by ordinance, but fails to do so, the public utility with the consent of the public utilities commission may fix a reasonable rate for its service, for as the court said in the case of *Cincinnati v. Public Utilities Comm.*, 113 Ohio St. 689, 150 N. E. 48, P. U. R. 1926C, 694: "But the commission found that there was no rate-fixing ordinance in effect in the city of Cincinnati for the period between May 1, 1925, and the effective date of the ordinance in question, and decided that, in the absence of a rate-fixing ordinance, a public utility has the right to file with the commission a schedule carrying its rates and charges covering the period of time during which there is no rate-fixing ordinance in effect; and it was upon

such ground that the motion to strike the schedule from the files was overruled. It is conceded that the rates and charges named in the schedule filed are precisely the same as the rates and charges fixed in the ordinance in question. As disclosed by the facts above stated, there was no regulatory ordinance of the city, or contract between the company and the city prescribing rates to be charged in effect during the period referred to. We therefore find that there was no error on the part of the commission in refusing to strike the schedule of rates from its files."

While a municipal franchise, granted under proper statutory authority, is valid and binding so far as municipal action can make it so, it does not become effective until the approval of the public service commission has been secured where this is required by statutory provision, for as the court said in the case of *Kelly v. Consolidated Gas, Electric Light & Co.*, 153 Md. 523, 138 Atl. 487: "If 'franchise' as used in the latter provision means municipal consent (in this case the consent of Havre de Grace), then before the appellee could begin construction in Havre de Grace under the ordinance of March 7, 1927, it required the permission and approval of the public service commission. * * * It is evident from the decision in this state that the ordinance of the mayor and city council of Havre de Grace consenting to the use of its streets by the appellee was a franchise, and before its exercise required the approval of the public service commission and permission for its exercise."

Where the municipality has express statutory authority to grant franchises, a municipal franchise may not be abrogated by the state commission under its general authority to regulate rates and service, for as the court said in the case of *Monroe Water Co. v. Monroe*, 135 Wash. 355, 237 Pac. 996: "Appellant relies upon the contention that the power given the department under the statutes to regulate rates and charges did not authorize it to abrogate a franchise provision in the nature of a consideration moving to the municipality for granting the franchise. * * * There was power conferred upon the commission to deal with the questions of safety, efficiency, rates, and quality of service, but none, either expressly or by necessary implication, to deal with the questions of franchises, or to modify any of the terms or conditions that may have previously been imposed. * * * We decided that the commission had no such power, and held that the power granted to it to regulate rates, fares, and service, related only to rates, fares, and service as affecting the general public, as distinguished from the proprietary rights of

the municipality granting the franchise. * * * The majority of the court are therefore convinced that the applicable provisions of the statute relating to regulation by the department of public works are the same as the applicable provisions of the statute relating to public carriers considered and decided in the afore-cited cases. The statutes being practically identical, the same decisions should govern both."

§ 630. **Statutory construction of power to regulate and fix rates.**¹⁰—The courts, however, are not agreed in their interpretation of the statutory enactments conferring upon municipalities the power to regulate and determine the service and the rates of municipal public utilities with regard to the expression necessary to confer power on the municipality to fix the rates in connection with contracting for the service. "The power to fix and determine the charges" for such service does not give the municipality the right to contract for the service at a fixed price, but only to regulate the rate from time to time. It is conceded, however, that, although the municipality is an interested party, the municipal authorities are competent to regulate the rates, for as the Supreme Court of the United States in the case of *Home Tel. & T. Co. v. Los Angeles, California*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. 50, decided in 1908, said: "The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service, is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation. * * * It has been settled by this court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation [or natural person] for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract the governmental power of fixing and regulating the rates. *Detroit v. Detroit Citizens Street R. Co.*, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. 410; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. 762. But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the

¹⁰ This section (§ 513 of second edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125 Va. 469, 99 S. E. 723, 9 A. L. R. 1148.

power. * * * The facts in this case, which seem to us material upon the question of the authority of the city to contract for rates to be maintained during the term of the franchise, are as follows: The charter gave to the council the power 'by ordinance * * * to regulate telephone service and the use of telephones within the city, * * * and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' It authorizes the exercise of the governmental power and nothing else. * * * The appellant further insists that the city council is not an impartial tribunal, because, in effect, it is a judge in its own case. It is too late, however, after the many decisions of this court which have either decided or recognized that the governing body of a city may be authorized to exercise the rate-making function, to ask for a reconsideration of that proposition."

§ 631. Power to regulate rates not surrendered by implication.¹¹—In construing the same expression of the power conferred upon the municipality "to fix and determine" the rate received for the service under a contract entered into by the defendant city for a term of fifty years, the court in the case of *Home Tel. & T. Co. v. Los Angeles, California*, 155 Fed. 554,¹² decided in 1892, held that as the intention of the city to abandon its right to regulate the matter by fixing the rate from time to time during the period of the contract did not clearly appear, the municipality was not precluded from doing so by virtue of the contract, for as the court said: "Is it true that, by the provisions of said section of said ordinance, the city of Los Angeles abandoned, for fifty years, its right to reasonably limit plaintiff's charges for telephone service? Can it be said that the abandonment of the power in question has been 'shown by clear and un-

¹¹ This section (§ 514 of second edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125

Va. 469, 99 S. E. 723, 9 A. L. R. 1148.

¹² Affirmed in 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. 50.

ambiguous language, which will admit of no reasonable construction consistent with the reservation of the power'? Certainly there is no express abandonment, and the circumstances of this case, particularly the long period of fifty years, forbid an implication of that sort. I do not mean to assert that, if a contract unequivocally abandoned a legislative power for fifty years, the duration of the abandonment would itself avoid the contract; but what I do say is that such a long period is a strong, if not conclusive, reason why an abandonment should not be implied."

A further decision to the effect that the power of the municipality to regulate rates is a continuing one, and that the right to exercise it at any time can not be surrendered by an agreement except in the case of a contract clearly and expressly so providing, pursuant to legislative authority clearly and unequivocally conferring such power upon the municipality and that even then this right of the municipality has sometimes been questioned, is furnished by the case of *Los Angeles, California v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. 736, decided in 1900, where the court said: "It is not denied that the city had power to regulate rates. Indeed, it is insisted that it was so constantly its duty that it could not be contracted away. It was not a power, therefore, necessary to be granted by the contract, and the distinction between the proprietary right and the municipal right, made by appellants, would have been idle to observe. To have limited the right of regulation to the city in one capacity, and left it unrestrained in the other, would have been useless, and such intention can not be attributed to the parties. We think, therefore, the power to regulate rates was an existent power, not granted by the contract, but reserved from it, with a single limitation—the limitation that it should not be exercised to reduce rates below what was then charged. Undoubtedly there was a contractual element; it was not, however, in granting the power of regulation, but in the limitation upon it."

That the power to regulate rates is continuous in the municipality, and that a reasonable provision for the renewal of a rate by contract will be sustained in the interest of the policy of retaining control over the regulation of rates by the municipality is indicated as follows in the case of *North Berwick v. North Berwick Water Co.*, 125 Maine 446, 134 Atl. 569, where the court said: "The contract was reasonable and fair and for a reasonable length of time. It contained a reasonable provision for its renewal, in case a sale to the town was not made, and a reason-

able working agreement for the protection of the inhabitants of the village of North Berwick, pending a new agreement or arbitration. * * * The rates, tolls and charges for private service were not fixed by the contract; the rates for the public service alone were so fixed and the furnishing of the public service at the rates and upon the terms and conditions provided in the contract 'is not to be construed' as constituting discrimination, or undue or unreasonable preference or advantage. P. L. 1923, c. 129, 32 (R. S. 1916, ch. 55, sec. 34). No change has been made in the rates and charges for the public service so published. They were therefore the lawful rates and charges in force during the municipal year 1923, and continue to be the lawful rates and charges until changed."

§ 632. Rates fixed by contracts not clearly authorized held declaratory only.¹³—Under the authority conferred upon the municipality by the state to make a contract for the service of a municipal public utility to be furnished to itself and to its inhabitants, the municipality has not by virtue of this fact nor by implication, authority to fix the rate on making the contract to be received for such service during the entire period covered by the contract, but such rate is only a declaration of what the municipality at the time agreed was a reasonable one. Such a stipulation does not preclude the municipality or the state from raising the question as to the reasonableness of the rate and readjusting it at any time so long as the rate fixed is reasonable.

Rates which are fixed by the municipality may be modified by the state commission in the absence of clear authority duly exercised to preclude such action, as the court held in the case of *State v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799: "When the city has entered into a binding contract with a public utility, fixing rates for a definite period, it surrenders for the duration of the contract its governmental function of rate regulation, so far as altering the contract rates is concerned. * * * As heretofore observed, rate regulation of public utilities is a distinctly legislative function of the state, and, though the state may confer on a city authority to enter into a contract for specific rates for a given period, since the effect of such a grant is to extinguish pro tanto a governmental power of first importance, the courts will not indulge the presumption that such a surrender

¹³ This section (§ 515 of second edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125

Va. 469, 99 S. W. 723, 9 A. L. R. 1148.

of power has been made, unless the legislative intention is expressed in clear and unmistakable language or is necessarily implied from the powers expressly granted, and all doubts will be resolved in favor of the continuance of the power. *Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176; *Pond on Public Utilities*, sections 498, 502. * * * The cases composing the first group hold that statutes of this character do not confer any rate-making power whatever. Typical cases are *Pioneer Tel. & T. Co. v. State*, 33 Okla. 724, 127 Pac. 1073; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. 370, and *Mills v. Chicago (C. C.)*, 127 Fed. 731. Cases of the second group hold that such statutes by necessary implication confer the power to fix rates for a definite period, not unreasonable in extent. *Boerth v. Detroit Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197. See, also, *Pond on Public Utilities*, section 420. In the third group are cases which hold that, though statutes of this character do not confer directly any rate-making authority, they do amount to a sort of tacit recognition by the state of the city's right to contract for rates, subject, however, to the paramount authority of the sovereign power of rate regulation and control. * * * If the state has clearly authorized the municipality to contract for the service of a municipal public utility and to fix the rates for a definite period, a contract made in pursuance of such authority can not be set aside by the state, but it is only in those cases where the authority delegated to the municipality clearly confers upon it the power to agree upon rates for a definite period and a contract has been made pursuant to such authority that the state precludes itself from exercising its undoubted governmental function of rate regulation and control. *Pond on Public Utilities*, section 503."

Authority in the city to bind itself to a fixed schedule of rates must clearly appear or the city will be free to regulate them for as the court said in *San Francisco-Oakland Terminal Rys. v. Alameda, California*, 226 Fed. 889: "No attempt is made by plaintiff to point out in any general statute governing its powers or in its charter any specific grant of authority to the city to contract away, even for a limited time, the governmental power of rate regulation; but the argument is that such authority is to be implied from the powers expressly conferred, and the want of any express reservation against the right to contract as to such rates. But it will be readily seen that, within the limitations of the above stated principles, no such implication can be predi-

cated of the language employed by the legislature in any expression it has given upon the subject."

To the same effect in holding that the power of the city to contract does not require that it be bound by fixed rates unless such authority was expressly conferred is decided in the case of *Puget Sound Traction, Light & Power Co. v. Reynolds*, 223 Fed. 371¹⁴: "We are unable to yield assent, however, to the proposition that these franchise ordinances create inviolable contracts between the municipality and the company protected by the contract clause of the federal Constitution. That a city ordinance may constitute a contract within the meaning of the constitution is well settled, but it is equally well settled that a municipal corporation can not barter away the police power of the state by unalterably fixing rates and fares during the life of a franchise, unless specifically and expressly authorized so to do by the supreme legislative authority in the state."

That the power to regulate does not include the power to fix rates by the city is clearly decided in *Uvalde v. Uvalde Electric & Ice Co.* (Tex. Com. App.), 250 S. W. 140, P. U. R. 1923D, 662, where the court held that: "We think the city did not have implied power to make a contract for light rates. The grant of power by the legislature to the city to regulate those rates was an exclusion of the power to make a contract for light rates that would suppress or suspend the expressly granted power to regulate. * * * All doubts must be resolved against the municipality's authority to make such a contract and in favor of the continuance of its governmental power."

§ 633. **Strict construction saves right to regulate if rate not expressly covered.**¹⁵—This matter of the construction of the statutory enactments authorizing municipalities to regulate and control the service of municipal public utilities and their charges is one about which the courts are not agreed, so that different results are reached by the decisions in the different jurisdictions, not only where the statutory enactments are different, but also by a different construction based upon practically the same statutory provisions. There is a series of decisions by the Supreme Court of Illinois to the effect that the power of the municipality to regulate the rates is a governmental one which is continuing

¹⁴ Affirmed in 244 U. S. 574, 61 Power Co. v. Commonwealth, 125 L. ed. 1325, 37 Sup. Ct. 705, P. U. Va. 469, 99 S. E. 723, 9 A. L. R. R. 1917F, 57. 1148.

¹⁵ This section (§ 516 of second edition) cited in *Virginia-Western*

in its nature and which is not exhausted by a stipulation in its contract executed pursuant to statutory authority conferred upon the municipality to contract for such a service without clearly or expressly stipulating for the power to fix upon a rate for the contract period.

These decisions of the Supreme Court of Illinois to the effect that an ordinance granting the necessary consent of the city to the use of its streets by the municipal corporation and contracting for its service for a period of years, although it contained a schedule of rates to be charged, does not bind the city to those rates for the entire contract period, but is at the most a declaration of what constitutes a reasonable rate at the time the ordinance was enacted were sustained by the Supreme Court of the United States on the ground that the nature and the extent of the power delegated to the municipality was uncertain and that as the statutory enactment was ambiguous it should be construed in favor of the public by reserving to the municipality the continued right to regulate the rates and readjust them from time to time as conditions changed, for as the court, in the case of *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363, which was sustained by the Supreme Court of the United States as reported in 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. 490, said: "We do not think the adoption of the alleged ordinance by the village of Rogers Park, and the acceptance and fulfilment of the conditions thereof by the appellant company, vested it, as with a property right, with the power to demand that the rates named in the ordinance should remain fixed and unchanged for the period in which it was licensed to occupy the streets of the village, or that the ordinance and its acceptance constituted a contract, or that any contract obligations arose by reason thereof.

* * * The power possessed by the state to enforce the duty might be properly exercised by establishing a scale of rates and prices to be demanded by the company from the inhabitants of the village, and this power, and that mode of exercising it, were delegated by the state to the village by section 1, article 10, chapter 24, of our Statutes (1 Starr & C. Ann. St. 1896, p. 785). The village exercised the power by incorporating in the ordinance a scale of prices as being just and reasonable maximum rates to be paid to the company by the consumer of water. This provision of the ordinance had no effect to establish a contract between the appellant company and the village that the individual inhabitants of the village should and would pay such rates for the period of thirty years, or any fixed period of time, but was

simply a declaration on the part of the village that such rates were reasonable. * * * A rate or price reasonable and just when fixed may, in the future, become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same; that is, to exact only reasonable compensation. The power of the state to enforce that duty is not exhausted by its exercise in the first or any subsequent instance, but is continuous, and may be exerted from time to time, whenever necessary, to prevent extortion by the agency created by the state to serve the public."

This same court in a later case sustained the power of the state under the provisions of its Public Utilities Act to regulate and control the operation of public utilities, including railroads, and to determine that public convenience and necessity required an elevated railway to carry freight as well as passengers over its lines in the city of Chicago, for as the court said in the case of Chicago, North Shore & Milwaukee R. Co. v. Chicago, 331 Ill. 360, 163 N. E. 141: "It seems clear that the provisions of section 81 of the Public Utilities Act * * *, and the provisions of the Cities and Villages Act * * *, relate to the location of the tracks over and along streets and consent or license to construct tracks across or upon the streets, rather than the supervision, regulation, and control of the operation of such railroads when constructed. Section 8 of article 1 of the Public Utilities Act, as revised in 1921 (Smith's Stat. 1927, p. 2130), confers upon the commerce commission, formerly the public utilities commission, general supervision of all public utilities. It can not be said to be the intention of the legislature that both the city and the commerce commission shall have jurisdiction of this matter. * * * The question here involves the power to regulate the operation of certain railroads now in the streets of the appellee city, and neither the consent of the city to the use of streets nor the charter contracts of these railroads is involved. In this case the public utilities commission, now the commerce commission, in the exercise of the police power of the state conferred upon it by the Public Utilities Act, has found that public convenience and necessity require that appellant be permitted to carry both passengers and freight over the lines of the elevated companies."

After the state has conferred authority on its commission, under the provisions of its Public Utilities Act, to regulate the service and the operation of public utilities, the municipalities

may not continue to do so, because the later statute transfers this power of regulation from the locality under an earlier statutory provision back to itself, for as the court said in the case of *Northern Trust Co. v. Chicago R. Co.*, 318 Ill. 402, 149 N. E. 422: "The Public Utilities Act covered the whole subject of public utility regulation. It was complete in itself, later in point of time, and evidently was intended by the general assembly to abrogate the power to require street cars to be equipped with headlights, theretofore exercised by municipalities organized under the general Cities and Villages Act. *Village of Atwood v. Cincinnati, Indianapolis & Western Railroad Co.*, 316 Ill. 425, 47 N. E. 449. Where the general assembly enacts a new statute upon a certain subject, and it appears from the act that it is the legislative intention to make a revision of the whole subject and to frame a new plan or scheme in relation thereto, there is, in effect, a legislative declaration that whatever is embraced in the new statute shall prevail, and that whatever is excluded therefrom shall be discarded. The revision of the whole subject by the new statute evinces an intention to substitute its provisions for the old law upon the subject."

§ 634. **Right to regulate under reserved right to alter, amend, or repeal.**¹⁶—This line of authorities permitting the municipality to regulate and readjust rates from time to time, after having made a contract for the service of the municipal public utility for a fixed period without authority clearly conferred upon it by the state to fix the rate for the entire period of the contract, is based on the right commonly reserved by the state or its agency to alter, amend, or repeal its grants of franchise rights, for as the court in the case of *Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118, 69 Am. St. 304, decided in 1899, said: "The authority 'to contract for a supply of water for public use for a period not exceeding thirty years,' does not necessarily imply that the price of the supply should be fixed for the entire period. * * * In section 1 of article 10 of the city and village act, approved April 10, 1872, in force July 1, 1872, it is provided as follows: 'The city council * * * shall have the power to provide for a supply of water * * * by the construction and regulation of * * * waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed

¹⁶ This section (§ 517 of second Va. 469, 99 S. E. 723, 9 A. L. R. edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125

by ordinance, and for a period not exceeding thirty years.' * * * The meaning of this language is not that the waterworks are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause 'for a period not exceeding thirty years' qualifies the words 'construction and maintain the same,' but does not qualify the words 'at such rates as may be fixed by ordinance.' In other words, the city council may authorize a private corporation to construct and maintain waterworks for a period not exceeding thirty years, and they may authorize a private corporation to construct and maintain the waterworks at such rates as may from time to time be fixed by ordinance. The evident meaning of section one is that there was to be reserved to the city council the power to fix rates by ordinance at such figures as should be fair and reasonable. * * * The price to be paid for water should be left to be determined from time to time, inasmuch as the growth of the city will enable the company to furnish water at much less cost than when the waterworks were first established."

The power of the municipality to regulate does not include the power to fix rates definitely for the contract period as is clearly stated in the case of *Oak Bluffs v. Cottage City Water Co.*, 235 Mass. 18, 126 N. E. 384: "The chief question to be determined is whether the contract of 1910, according to the correct construction of its terms, purports to fix definitely the rates for domestic consumption for a period of twenty years, unless changed by agreement with the town. The only part of the contract which purports to establish rates for domestic consumption is paragraph thirteen * * *. It is to be noted that there is nothing in that paragraph which by fair intendment fixed rates for any definite period of time. The obligation of the water company therein stated is to 'revise its rates' so that the prices shall conform to the schedule annexed. Instead of saying that the prices so fixed shall be permanent or shall continue for the term of the contract, they are expressly made 'subject to such reasonable additions thereto and amendments and modifications thereof from time to time as shall be found proper and expedient, and the laws of the commonwealth may permit or require.' This modifying clause applies to all the preceding part of the paragraph."

Where a public utility is operating without a franchise, and a municipality passes an ordinance providing for unreasonable rates for the service, the company is not bound thereby, although

its right to continue to operate depends upon the continuing consent of the city, especially where there is no statutory authority giving the municipality the right to fix rates. This principle is established and discussed as follows in the case of Hardin County Kentucky Tel. Co. v. Elizabethtown, 227 Ky. 778, 14 S. W. (2d) 162: "The conducting of its business within the city was by virtue of no property right, but only after the manner of a mere temporary license, and, being so, the city had the right, to not only revoke the license at any time, but also to alter the terms, including charges for the temporary occupancy. It will be remembered that plaintiff obtained no franchise in the manner required by the constitutional section [§ 164], supra, and throughout its operations within the city of Elizabethtown it has been only a licensee by sufferance of the city. For the two reasons mentioned the court properly refused the injunction against prosecutions of plaintiff for its failure to comply with the ordinance requiring the payment of an annual license fee of \$100, and we are without authority to disturb the judgment on the original appeal, upon the urged ground that the city was without authority to enact it. * * * The city was without authority to fix the rates as contained in the attacked ordinance. That contract obligated the Gainsboro Telephone Company to 'respect and obey all ordinances now in force regulating the * * * rates, charges, * * * and shall render itself amenable to all reasonable ordinances hereinafter enacted relating to and regulating the conduct of the business of telephone companies in this city.' * * * The rate-fixing ordinance here involved was not an existing one at that time and was not enacted until nearly six months thereafter. Its binding force under the contract, therefore, is to be measured by the promissory obligations to observe future enacted ordinances 'relating to and regulating the conduct of the business of telephone companies in this city.' It is doubtful if that language includes a rate-fixing ordinance, or any other than mere regulatory ones relating to the conduct of the business. But, however that may be, the contractual obligation was to observe only 'reasonable' ordinances hereinafter enacted, and if the language relating to such future ordinances is broad enough to include rate-fixing ones, then the rates, in order to be obligatory upon the telephone company, who was a party to the contract, must be reasonable. It is the law everywhere that in all instances wherein the power to fix rates exists, they should not be so unreasonably low as to deprive the operator of the

utility to which they apply of a reasonable profit on his investment."

While the power to regulate the service of a public utility rests with the municipality, it may not require an unreasonable extension of service on the theory that "public necessity" requires it. What constitutes "public necessity" is a question of fact, and the courts will not require an unreasonable expenditure for an extension of service on this account, especially where the inhabitants interested in the service do not desire it. This principle is established and discussed as follows in the case of *State v. Duluth St. R. Co.*, 179 Minn. 548, 229 N. W. 883, P. U. R. 1930C, 477, where the court said: "'Necessity,' as here used, means now or in the near future. In *re Staten Island R. T. Co.*, 103 N. Y. 251, 8 N. E. 548; *Warden v. Madisonville, H. & E. R. Co.*, 128 Ky. 563, 108 S. W. 880. 'Necessary' does not mean that a thing will possibly be needed at some remote time in the future. *Port of Everett v. Everett Improvement Co.*, 124 Wash. 486, 214 Pac. 1064. Indeed, 'public necessity,' in such measures should be construed as meaning urgent public convenience. *Com. v. Gilligan*, 195 Pa. 504, 46 Atl. 124. Speculative purposes will not support the assertion of necessity. We have here the rather unique situation of the council directing an extension into a territory wherein the inhabitants do not wish it. * * * The principal argument in support of the action of the council perhaps rests upon the assertion that the proposed extension is a public necessity because of the church and the high school. But it would seem that the existing lines turning on to Wallace Avenue give substantially the same service to the church; and we are unable to grasp the view of an existing necessity requiring the expenditure of so much money under the circumstances and building a line 2,700 feet to save school children a walk of about 700 feet. It is quite a common understanding that a moderate amount of walking is beneficial to all of us, including school children. Some school children now walk four blocks from the Superior street car line. * * * Upon a consideration of all the evidence in the case, we reach the conclusion that it clearly appears that public convenience and necessity did not require the construction of the proposed extension, and that the order therefor was arbitrary and unreasonable. Hence, the writ should not issue."

§ 635. Regulation continuing and akin to police power.¹⁷—

The question of the power vested in municipalities to determine the rate to be charged for the service rendered and of the construction of the statutory enactments conferring the power of regulation upon municipalities by the state is a subject upon which the courts are not agreed. Because it is a question of statutory construction as well as of statutory expression and because it is important that the regulation of the rates remain continually in the municipality, the decisions favor a strict construction and deny the right of the municipality to preclude itself from the exercise of its right to regulate rates from time to time unless it has clearly done so under ample authority conferred upon it by the state for that purpose, for as the court in the case of *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888, decided in 1901, said: "Under the cases we have cited, and others that might be collated, it is, we think, apparent that the authorities are not agreed as to whether the state can by legislative grant empower a municipality to enter into an irrevocable and perpetual contract with a water company or other private or quasi-public corporation for a system of waterworks and a supply of water, and whether such company can by legislative grant be removed from the supervision of the police power of the municipality, yet we think there is no question but that, in order to do so, the legislative grant must be unquestionable and admit of no other construction, but must be plain, positive and unequivocal. If the municipality has no such power under legislative grant, it can make no such contract; nor can it waive its police powers, or refuse to exercise them, when the good of the citizens of the municipality demands. * * *

While the rate to be paid for water is not so palpably a regulation within the police supervision of a city as is the purity and supply of the water furnished yet the rate of charge is a matter which affects the health, welfare, and comfort of the city, since, if rates are unreasonably high, they will prove a restriction upon the use of water which may seriously impair the health and interfere with the comfort and welfare of the people—especially the poorer classes, who by reason of high prices may be cut off from the benefit of the water partially or altogether. * * *

The language of the city charter in the present case is not that the corporate authorities shall have power by ordinance to fix,

¹⁷ This section (§ 518 of second Va. 469, 99 S. E. 723, 9 A. L. R. edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125 1148.

but to regulate, the price of water to be supplied by such company, and in the same connection the full police and general powers of the corporation are reserved to it. We are of opinion that the right to regulate rates was not exhausted by an agreement at any particular time upon a schedule of prices, but it is a continuing right, under the terms of the charter, but not to be exercised arbitrarily and unreasonably."

In sustaining this decision the Supreme Court of the United States in the case of *Knoxville Water Co. v. Knoxville, Tennessee*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. 531, decided in 1903, by way of construing the right of this municipal public utility, said: "The water company was incorporated in Tennessee in 1882 to construct waterworks in or near Knoxville, with power to contract with the city and inhabitants for the supply of water, and to 'charge such prices for the same as may be agreed upon between said company and said parties.' This incorporation was under a general act which provides as follows: 'And this [act] is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company.' * * * 'Said company will supply private consumers with water at a rate not to exceed five cents per 100 gallons,' subject to an immaterial proviso. These are the words relied on by the company. They are assumed to contain an implied undertaking on the part of the city not to interfere with the company in establishing rates within the contract limits. * * * In the present case it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law under which the water company was created. It would require stronger words than those used here to raise the question whether, under the statutes in force, the city could do it if it tried. The contracts fixing prices authorized by the statute were contracts between the company and its customers, not, as in the case of the railway company, a single contract between the company and the city, and were subject to the power to regulate them given to the city by the same statute."

In the absence of a clear intention and the taking of all proper proceedings to grant a franchise, the court will not enforce it, especially where it involves a restriction of the police power. That all presumptions will be indulged in favor of the retention

of its police power by the municipality is indicated by the decision in the case of *Schnieders v. Pocahontas* (Iowa), 234 N. W. 207, where the court said: "The principle is well settled that a franchise of the character involved herein constitutes a contract between the state and municipality upon one hand and the grantee of the franchise upon the other. The franchise when granted can not be abrogated by either party without the consent of the other. There can be no quarrel with the proposition that the police power belongs exclusively to sovereignty and inheres in the state without reservation in the constitution and is given expression by the legislature. This power can neither be abridged, abdicated, nor bargained away. It results, therefore, that the state can not divest itself in any manner of the power to enforce it. 'Since the state can not divest itself of the police power, so when it is delegated to the city or town the latter, as the state's creature or agent, can not divest itself of any such power so granted by contract, or otherwise; nor limit or restrain in any manner the full exercise of the power to protect the morals, safety, health, order, comfort, or welfare of the public. This is true because a city or town in the exercise of its police power acts in a governmental capacity, or, as sometimes said as the political agent of the state, and can not be estopped by the contracts; it can not abandon its duty in this respect even if it willed to do so.' McQuillin (2d edition), volume 3, section 935. * * * We conclude in the instant matter under the record evidence that no franchise was granted by the favorable vote of the electors, and not until and unless the town council of Pocahontas enacted an ordinance in conformity to section 5717, Code 1927. The town council of Pocahontas has not so acted. It follows that the ruling of the trial court in striking and dismissing the material allegations of the petition of intervention was correct."

A municipality, in the exercise of its police power under the constitution, and as a matter of regulating its street traffic, may provide for the abandonment of street railway service in some of its streets, especially, where the company acquiesces, and the objection of neither the public service commission nor customers, desiring the continuance of the service, can prevent its abandonment according to proper municipal action, for as the court said in the case of *Birmingham Electric Co. v. Allen*, 217 Ala. 607, 117 So. 199: "An entirely different question is here presented, where the public utility acquiesces in the comprehensive scheme of the city commission by resolution duly passed,

for the regulation of traffic in the city, involving the abandonment of some of the street car lines therein. * * * Whatever vested interest the defendant may have under its franchise from the city is not here presented or considered, as defendant does not complain, but acquiesces in the action of the city as in the exercise of its police power. * * * Whatever inconvenience complainants may suffer, we think it clear they have no right to the continued operation of this particular line which could rise superior to the authority of the city in the exercise of its police power under our constitution, and the decisions construing the same. * * * The subsequent section 9814 of the Code expressly provides that nothing contained in such article of the Code shall be construed as a limitation or restriction upon the police jurisdiction or power of municipalities over their streets or highways, or the power of such municipalities 'to adopt and enforce reasonable police regulations and ordinances in the interest of the public safety, morals and convenience.' Properly construed, as previously stated, the city authorities acted in the exercise of their police power in the general regulation of traffic in the city, and, an exercise of legislative discretion, over which the public service commission has no control."

While a municipality, in the exercise of its police power and in the regulation of its street traffic, may regulate or deny the use of the streets under certain conditions, this power must be exercised through its legislative and not by its administrative department, for such power, being legislative, can not be delegated to its police department, which is administrative. This principle is clearly set forth as follows in the case of *Thompson v. Smith*, 155 Va. 367, 154 S. E. 579: "The power of a city to control and regulate the use of its streets is a continuing power to be exercised as often and whenever the city may think proper. *Washington, &c. R. Co. v. City Council of Alexandria*, 98 Va. 344, 36 S. E. 385. The issuance and revocation of such permits by a city is merely a means of exercising the police power of the state delegated to the city to regulate the use of the public highways in the interest of the public safety and welfare. The constitution of Virginia expressly provides that 'the exercise of the police power of the state shall never be abridged.' Constitution of Virginia, section 159. * * * Certainly the ordinance itself affords no answer to these questions as to the scope of the policy of the law therein declared. It is left wide open to the uncontrolled discretion of the chief of police in each individual case. * * * While the city of Lynchburg, in the exercise of its

police power, may revoke driving permits for some cause unrelated to the use of the public highways and the safety of persons and property thereon, it must do so by legislative enactment and not by administrative edict. That portion of the ordinance here in question which authorizes the chief of police 'to revoke the permit of any driver who, in his opinion, becomes unfit to drive an automobile on the streets of the city', * * * is void because it delegates powers essentially legislative to an administrative officer."

§ 636. Liberal construction holds contract binding on rates.¹⁸

—Where, however, a more liberal construction is given of the power conferred upon the municipality to regulate the service, a number of jurisdictions have held that where the municipal public utility accepts and acts upon an ordinance permitting it to install its plants and furnish its service a contract is entered into which is binding upon both parties with reference to the rates fixed by its terms as well as to the other items of the contract, for as the court in the case of *Cleveland, Ohio v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. 756, decided in 1904, said: "The question for decision, then, is, did the consolidated ordinance of February, 1885, and the ordinance thereafter passed and accepted, already referred to, constitute binding contracts in respect to the rates of fare to be thereafter exacted upon the consolidated and extended lines of the complainant? That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. * * * In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time."

Where the municipality is authorized to contract for a public utility service and to fix rates for it such a contract suspends the governmental power to regulate rates during the period embraced by the contract, for as the United States Supreme Court in the case of *St. Cloud Public Service Co. v. St. Cloud, Minnesota*, 265 U. S. 352, 68 L. ed. 1050, 44 Sup. Ct. 492, said: "It

¹⁸ This section (§ 519 of second Va. 469, 99 S. E. 723, 9 A. L. R. edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125

has been long settled that a state may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. *Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. 50, and cases there cited. And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial. *Southern Iowa Elec. Co. v. Chariton*, 255 U. S. 539, 542, 65 L. ed. 764, 775, 41 Sup. Ct. 400, and cases there cited; *Paducah v. Paducah R. Co.*, 261 U. S. 267, 273, 67 L. ed. 647, 651, 43 Sup. Ct. 335; *Georgia R. & Power Co. v. Decatur*, 262 U. S. 432, 438, 67 L. ed. 1065, 1073, 43 Sup. Ct. 613. * * * In the light of these decisions of the Supreme Court of the state of Minnesota we think it is clear that the city had authority, in 1905, under its charter and the laws of the state, to enter, by ordinance, into a contract, in its proprietary capacity and for the benefit of its inhabitants as well as itself, providing for the construction and operation of gas works for a period of thirty years, and fixing the rates to be charged for gas sold to it and its inhabitants. This power existed, under the doctrine of the *Reed* case, 85 Minn. 294, 88 N. W. 981, under the provisions of the charter giving the council the power to provide for the control and erection of gas works for the purpose of supplying the city and its inhabitants with heat and light. * * * We think that the language of the ordinance, viewed in its entirety, clearly shows that it was the intention of the parties to enter into a contract for the construction of gas works and the manufacture and supply of gas to the city and its inhabitants during the thirty-year period, at the maximum rate prescribed."

§ 637. **Delegated power to fix rates by contract or franchise limited thereby.**¹⁹—Where the authority to regulate the service and fix the rates to be charged for it is conferred on the municipality with a provision that the rates shall be fixed by contract or in the franchise, the municipality which makes a contract for such service or grants a franchise permitting the municipal pub-

¹⁹ This section (§ 520 of second Va. 469, 99 S. E. 723, 9 A. L. R. edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125 1148.

lic utility to install its plant and furnish its service without fixing the rates to be charged, may not thereafter by ordinance regulate the rates, for as the court in the case of *Richmond v. Richmond Natural Gas Co.*, 168 Ind. 82, 79 N. E. 1031, 11 Ann. Cas. 746, decided in 1907, said: "Where a franchise to supply gas is granted without restriction as to prices, accepted, and acted upon, cities incorporated under the general law of this state had no authority prior to 1905 by subsequent ordinance or action to impose additional provisions regulating prices to be charged for gas furnished under the original franchise. * * *

The general assembly of 1905, in revising the statutes governing cities and towns, conferred upon cities the following among other powers: '(36) To license and regulate the supply, distribution and consumption of artificial and natural gas, electricity, heat and water, and to fix by contract or franchise the prices thereof,' etc. * * *

The statute relied upon purports to empower a city of the class to which appellant belongs to fix prices only 'by contract or franchise.' When the manner in which a delegated power is to be exercised is prescribed, it must be substantially followed. * * *

The ordinance under consideration is without any of these characteristics. It neither grants a new right, nor confirms or extends an existing one, but merely seeks to impose special restrictions upon an existing right to the use of the streets and alleys of the city. * * *

In the absence of charter authority or other statutory or constitutional provisions, delegating the power in express terms or by necessary implication, it is the rule that a municipal corporation has no power to fix by ordinance the price at which a gas company shall supply its customers.²⁰ * * *

In this case it appears that the attempted regulation of prices was not done by contract, or in connection with the granting or acceptance of a franchise, and the legislature has not delegated to appellant whatever authority to regulate prices of gas it may possess in the premises, to be exercised in any other manner."

§ 638. Contract giving consent and fixing rates valid.²¹—Many cases sustain the right of the city to stipulate, as a condition of the granting of its consent to the municipal public utility installing its plant and rendering its service, where such consent is made necessary by statutory provisions, a specific rate

²⁰ 20 Cyc. 1166, and cases there cited.

²¹ This section (§ 521 of second edition) cited in *Virginia-Western*

Power Co. v. Commonwealth, 125 Va. 469, 99 S. E. 723, 9 A. L. R. 1148.

which may not be exceeded for the service to be furnished by the municipal public utility, which after accepting the grant of the consent by the city on such condition is thereby precluded from charging rates in excess of those so fixed, for as the court in the case of *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197, decided in 1908, said: "The city may refuse to grant that consent. It is clear, too, that it may attach conditions to its consent. * * * There is no doubt that the municipality may determine for what length of time a gas company may use its streets for carrying gas. It had, therefore, authority—an authority exercised in this case—to determine that the gas company should use the streets for a period of thirty years for the purpose of supplying its inhabitants with gas. * * * It may be said then that, in order to safeguard the rights of its inhabitants who use gas, it is not only reasonable that the city should have this power to fix rates, but it is highly expedient—indeed, it is necessary—that it should possess that power. * * * The power to prescribe rates by contract—and that is the power which was exercised in this case—is a very different power from the legislative power regulating rates."

A contract with the city fixing rates as a condition of getting its consent is valid and binding as the court held in the case of *Belle Plaine v. Northern Power Co.*, 142 Minn. 361, 172 N. W. 217, P. U. R. 1919E, 625: "The rates charged by a public service corporation for service furnished to the inhabitants of a municipality may be regulated by contract as well as by ordinance. In this case permission had to be obtained from the borough to use its streets for the maintenance of the poles and wires over which electric current was delivered to the users thereof. As the price of granting such permission, the borough was at liberty to demand that the charges for electricity should not exceed a certain fixed sum. The grantees of the franchise were at liberty to accept or reject the terms offered. When the proposed terms were accepted, a valid contract was made. The only distinction between the power to regulate rates by ordinance and by contract is that the former calls for the exercise of a governmental function, and the latter for the exercise of the business or proprietary powers of the municipality. The first requires the consent of only one body; the second, consent of two bodies."

That such power of local control obtains in Ohio is indicated by the case of *Universal Machine Co. v. Ohio Northern Public*

Service Co., 13 Ohio App. 271, 32 O. C. A. 525, where the court said: "The establishing of rates to be charged by public utilities in Ohio is within the control of the public utilities commission of the state, except in so far as the same is vested in municipalities by virtue of the exceptions in the statutes. Under section 614-44, General Code, municipal corporations are authorized to fix public utility rates by ordinances. By virtue of the provisions of section 614-47, General Code, valid contracts for supplying electric current by a public utility company are not subject to control or modification by the public utilities commission of the state, if the rates have been lawfully fixed by a municipality under sections 614-44, 3982 and 3983, General Code. This principle has been clearly enunciated by the Supreme Court of Ohio in *Ohio River Power Co. v. City of Steubenville*, 99 Ohio St. 421."

To the same effect the principle is stated by this court in the case of *Columbus v. Public Utilities Comm.*, 103 Ohio St. 79, 133 N. E. 800, as follows: "It has become established by numerous decisions of this court that an ordinance adopted by the municipality and accepted by the company constitutes a contract, and the rights of the parties thereunder are to be determined by its terms. * * * The claim that a stipulation for a maximum rate for service can not be made a part of the consideration for the consent is not justified. The consent is purely discretionary with the city, and no one would contend that mandamus would lie to compel the consent, or that any power other than the legislative body of the city could dictate the terms and conditions. * * * We have therefore reached the conclusion that the rate stipulation is, upon reason and principle, a valid condition to the consent contract."

While a municipality has the power to grant franchises to public utilities for the use of its streets, which create no additional servitudes, after having done so, and the public utility, relying on such action, makes substantial expenditures, the municipality may not revoke its consent, for as the court said in the case of *Towne v. Wenham*, 267 Mass. 343, 166 N. E. 739: "That the requirement of the statute as to notice to owners is fulfilled if notice is given to owners, as such ownership is determined by the last preceding assessment for taxation, is obvious from the fact that the owner of a fee in land which is subject to a public easement of travel is not, as of right, entitled to any notice or hearing, before the legislature directly or through any subordinate public board or agency can grant permits for additional public service over, across or under such public way, unless such

grant or permit creates an additional servitude on the highway in or across which the use is permitted. * * * The action of the selectmen of Boxford taken in March, 1928, * * * was invalid as against the company which, in reliance upon the action of the selectmen, had, after the grant and before the revocation, acquired various parcels of land in Danvers necessary for the construction of its transmission lines at a total expense of over \$17,000, and had accepted certain restrictions and conditions which had been confirmed and established by the department of public utilities."

Where a rate for public utility service has been fixed by the parties concerned by contract under proper legislative authority, wherein the intention of the legislature to vest the power of fixing such rates in the municipality and the company furnishing the service by contract is clearly evidenced, the rate continues to prevail for that reason, unless the state has conferred the power of regulation on its public service commission. That this has not been done and that the rights of the parties continue to be fixed by its Rapid Transit Act is the effect of the decision in the case of *New York v. Interborough Rapid Transit Co.*, 232 App. Div. 233, 249 N. Y. S. 243, P. U. R. 1931E, 161, where the court said: "Both the agreement and the certificate provided that the Interborough Company would charge a fare of 'five cents but no more,' for a continuous ride in one direction over the routes described. The Interborough Company, by filing tariff sheets setting forth a proposed fare of seven cents as the fare thereafter to be exacted on its lines, instead of five cents as provided in the contract and certificate, sought to nullify the provisions calling for a fare of not more than five cents. * * * If, however, a valid inflexible fare is imposed by the contracts existing between the parties, the matter of alleged inadequacy of fare to make a reasonable return is not material to this discussion. * * * These contracts contained the provision that 'the contractor shall for the term of the lease be entitled to charge for a single fare upon the railroad the sum of five cents but not more.' * * * After 1906 the concurrence of the state and the local authorities was requisite to the making of any such contracts. * * * Nowhere in the Public Service Law is there anything subjecting the Rapid Transit Act to the terms of such law. There seems no basis for the contention of the defendant that the Public Service Law inferentially subjected the Rapid Transit Act to its terms and provided a means for increasing the five-cent fare which was fixed by contract under a special act of the legis-

lature, to wit, the Rapid Transit Act. As before stated, the Supreme Court pointed out there are no words in the law purporting to amend or modify the Rapid Transit Act, except those transferring the powers of the rapid transit commission to the public service commission. The history of the amendments and the litigation connected therewith are persuasive as to the intention of the legislature to vest the power in the city and the company both as to subway and elevated lines to make binding contracts for an unchangeable five-cent fare. There is no mention in contract three or suggestion that the contract was made under the Public Service Law. Article 3 of the contract provides: 'This contract is made pursuant to the Rapid Transit Act which is to be deemed a part hereof as if incorporated herein.'

* * * The Rapid Transit Act, reenacted subsequent to the enactment of the Public Service Law of 1907 (Wagner Law of 1912), authorized the parties to enter into contract three and the elevated extension certificate, and to agree therein upon a rate of fare to be in effect during the terms of the contract. The United States Supreme Court has pointed out that, where public service corporations and governmental agencies dealing with them have the power to contract as to rates and exert that power by fixing, by contract, rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore, the question of whether such rates are confiscatory becomes immaterial. * * * If a reasonable rate of fare does not always coincide with a contractual rate as determined by the parties, a contract made by legislative authority must be the supreme test, because, if it is not the supreme test, the authority to contract for a fixed rate of fare becomes meaningless. * * * Whenever the general terms of the Public Service Commission Law have covered a subject dealt with by particular legislation, it has been held that the commission was without jurisdiction, and that the application of the particular legislation was exclusive."

A further discussion of this principle is furnished as follows in the case of *New York v. Interborough Rapid Transit Co.*, 257 N. Y. 20, 177 N. E. 295, P. U. R. 1931E, 278: "By this action and by this special proceeding, the single issue is presented whether authority has been conferred upon the transit commission to increase the rate of fare upon subway and elevated railroads operated by the Interborough Rapid Transit Company. * * * Since the enactment of the original Public Service Commissions Law by chapter 429 of the Laws of 1907, the Rapid

Transit Act of 1891 has run parallel with it. The later statute is operative throughout the entire state, but the Rapid Transit Act, in form general and in terms applicable to all cities of one million inhabitants, is in fact effective only in the territory included within the city of New York. * * * Our opinion is, however, that instead of superseding or modifying the provisions of the old contracts in respect to rate of fare, the new contract merely adopted them, extended them to itself and incorporated them within itself. * * * The power of the transit commission can not be taken by implication. It must be given by language which admits of no other reasonable construction. *Siler v. Louisville & N. R. Co.* (1909), 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. 451."

§ 639. Fixing maximum rates permits regulation as to reasonableness.²²—While the city may thus protect itself from exorbitant rates by fixing the maximum to be charged in the franchise granting its consent to the municipal public utility, decisions to this effect have held that this does not preclude a determination as to the reasonableness of the rate fixed and its reduction in case it is unreasonable and excessive, for as the court in the case of *Moberly v. Richmond Tel. Co.*, 31 Ky. L. 783, 103 S. W. 714, decided in 1907, said: "The city may annex any lawful condition to the exercise of the franchise, which becomes a part of the contract under which it is thenceforth used. And we think it was competent for the city to provide, as a condition of the franchise, that the rates to citizens should not exceed the schedule fixed in the ordinance, or any future ordinance."

Such provisions are regarded as precautions in the interest of the public and only as a means for securing adequate service at reasonable rates, which right the courts agree should always be available, for as the court, in the case of *Public Service Corp. v. American Lighting Co.*, 67 N. J. Eq. 122, 57 Atl. 482, decided in 1904, said: "The fundamental and cardinal principle being that all corporations enjoying a franchise of this character, and the complete or partial monopoly resulting therefrom, are bound to serve the public upon reasonable terms and upon reasonable rates, so that neither the public is at the mercy of the corporations enjoying the franchise nor are the corporations at the mercy of the public. Their dealings must all be subject to the test of reasonableness on both sides."

²² This section (§ 522 of second edition) cited in *Virginia-Western Power Co. v. Commonwealth*, 125 Va. 469, 99 S. E. 723, 9 A. L. R. 1148.

That the city may control rates under a contract fixing maximum rates is decided in the case of *Bismarck Gas Co. v. District Court of Burleigh County*, 41 N. Dak. 385, 170 N. W. 878, P. U. R. 1919C, 394: "There was no compulsion, but assuredly the company was not free to accept the grant and its benefits and to repudiate its conditions. The city must have a right to insist that the company shall observe the conditions or that the charter shall be forfeited. That is plain common sense. If the company insists on holding its grant and fails to observe its conditions, that is a gross wrong for which the city has a constitutional right to a remedy by due process of law. The plaintiff cites several cases holding that the courts have no jurisdiction to fix rates, but the question presented is not one of rate fixing. The question is: May the gas company, or any party accept a grant of a charter and avail itself of the benefits, and repudiate its conditions and obligations? May it accept from the city a valuable charter, fixing a maximum rate for gas, and then turn around and charge twice the maximum rate? And in such a case shall we say the city may not invoke the courts to forfeit the charter or to enforce its condition? Assuredly it is a familiar rule of law that a grant upon conditions may be forfeited for a failure to observe its conditions. But if the question presented be merely one of contract then clearly it was competent for the city, in granting a franchise, to protect itself and the people of the city by contracting for maximum rates."

That it is the policy to regulate rather than fix fares is reiterated in the case of *Paducah, Kentucky v. Paducah R. Co.*, 261 U. S. 267, 67 L. ed. 647, 43 Sup. Ct. 335, P. U. R. 1923C, 309, as follows: "The conclusions to be drawn as to the matter in controversy are obvious. The parties agreed to and were bound to the specified fares for the first twelve months. These fares were not agreed to be maximum for any other part of the franchise term. The right of the company thereafter to have fares sufficient to provide a reasonable rate of return upon its invested capital was not contracted away. The power and duty of the city thereafter to prescribe fares that are just and reasonable were not contracted away; it was definitely understood that if, from any such reports, it appears that 'the fare as fixed' (meaning, as established and in effect) was excessive, the city will reduce such fare accordingly."

§ 640. Fixing rates not favored—Tends to create monopoly.²³—The legal principle denying the municipality the power to preclude itself from regulating the rate to be charged for municipal public utility service from time to time by a contract to that effect in the absence of clear authority conferred upon it by the state, and the attitude of the courts in construing strictly the grant of such authority and the provisions of such a contract with reference to the question of rates has been the one generally accepted by the courts for many years, for as the court in the case of *Illinois Trust & Sav. Bank v. Arkansas City Water Co.*, 67 Fed. 196, decided in 1895, said: "The right to furnish water for public and domestic use within a city is a public service, and of such high consequence to the public that it should at all times remain open to the control of the city council for the benefit of the public. The contract here insisted upon would place the matter beyond the control of the council for a long period of time. This is in the nature of an attempt to create a monopoly—a power which the city council never possesses, unless it is delegated in clear, unmistakable terms."

That regulation of rates is preferable to their being fixed by contract is well expressed by the court in *Milwaukee Electric R. & Light Co. v. Railroad Comm. of Wisconsin*, 238 U. S. 174, 59 L. ed. 1254, 35 Sup. Ct. 820, as follows: "The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make a contract which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed."

Retaining the right to regulate rates is the policy generally accepted as being in the best interests of the public and all parties concerned, and that this policy is favored by the courts is clearly indicated in the case of *Ottumwa R. & Light Co. v. Ottumwa* (Iowa), 178 N. W. 905, P. U. R. 1921B, 666: "The vital requirement is that power to make a contract fixing permanent rates be given expressly and by 'unmistakable grant.' Rosecrans

²³ This section (§ 523 of second Power Co. v. Commonwealth, 125 edition) cited in *Virginia-Western Va.* 469, 99 S. E. 723, 9 A. L. R. 1148.

v. U. S., 165 U. S. 263, 17 Sup. Ct. 302, 41 L. ed. 708; U. S. v. Jackson, 143 Fed. 787, 788, 75 C. C. A. 41. The grant must be in explicit and convincing terms, and all doubtful expressions are to be resolved against power to contract for irrevocable rates. Knoxville Gas Co. v. City (C. C. A.), 261 Fed. 283. * * * The power to fix rates is purely governmental and legislative and in some aspects an exercise of the police power. * * * This governmental power can not be limited by contract, much less entirely abrogated by it, and it has no limitations, except that both parties must respectively permit and be satisfied with such rates as shall be just and reasonable. * * * In fewer words the cases proceed on the general theory that it is against public policy to contract for unchanging rates; that there must be no such contract, because its enforcement might, on the one hand, fasten what proves to be an exorbitant charge upon the patrons, or, on the other, prove a rate that will confiscate the property of the service corporation. While there are other lines of reasoning advanced in the authorities, in the main and at the present time, the decisions run on the broad ground that public policy forbids such contracts, unless the legislature, the ultimate judge of what is public policy, declares unmistakably that such contracts do not offend that policy. Murray v. City, 226 U. S. 318, 33 Sup. Ct. 107, 57 L. ed. 239; Ft. Smith Co. v. Ft. Smith (D. C.), 202 Fed. 581."

That the fixing of rates is not favored over the continuing right to regulate them is the policy generally sustained, and, unless the municipality has this power and clearly exercises it, the attitude of our courts favors the retention of the power to regulate over the exercise of the power to fix rates, for as the court said in Farmersville v. Texas-Louisiana Power Co. (Tex. Civ. App.), 33 S. W. (2d) 271: "For some weeks prior to the enactment of the ordinance, appellee was using this reduced schedule of rates for electric power and light. The suit by appellant seeks a judgment that would destroy this existing status, compel appellee to abandon its reduced schedule, and adopt the schedule of rates prescribed by the ordinance. The temporary injunction issued gave to appellant at once the full equity relief it prayed for upon final hearing of the case. The court, on motion of appellee, dissolved the injunction thereby leaving the status of the parties as such status existed at the time the controversy arose. There was no error in this. * * * By this article the legislature of this state has delegated to the governing body of all cities and towns of over 2,000 population the right

to fix by ordinance the rates to be charged by public utilities operating within the corporate limits of such city or town. It is only through this delegation of power that appellant had the right to pass the ordinance in question, and it is given this power only in the event there is within its corporate limits more than 2,000 inhabitants. * * * We think it is reasonably apparent that the population of the city or town made the subject of this legislative enactment must be determined at the time the particular city or town attempts to exercise the delegated power granted by the enactment. * * * A trial court does not abuse its discretion in dissolving a temporary writ of injunction, granted ex parte, in a case in which there is shown to exist a serious controversy as to plaintiff's right to the relief sought in the suit, and where the refusal to allow the injunction does not destroy the status quo of the subject-matter of the litigation, as same existed at the time plaintiff instituted proceedings to enforce his alleged rights."

In the absence of clear, expressed authority the state rather than the municipality has the right to fix rates, and any doubt as to the power of the municipality to do so is resolved in favor of the state, for as the court said in the case of *Tillery v. McLean* (Tex. Civ. App.), 46 S. W. (2d) 1028: "It is conceded that the town of McLean, the appellee, is a municipal corporation, incorporated under the general laws of the state and has fewer than 2,000 inhabitants. It is the settled law that the power to regulate rates charged by a public utility is inherent in the state. * * * This statute manifestly did not delegate to the appellee the right to regulate by ordinance the rates charged by appellants for the gas furnished to its customers. * * * We think it clear that the town of McLean at the time it enacted Ordinance No. 44, was without authority to regulate the gas rates of appellants by ordinance. At least there is a 'fair, reasonable, substantial doubt concerning the existence of the power,' and it must therefore be resolved against the municipal corporation."

§ 641. Regulation of motor vehicles.—Since there is no right to use the streets of the city for private gain by conducting a business therein, permission to do so may be granted or refused by the authorities on such terms and conditions as are reasonable and in the interest of the public welfare. A municipality, acting under proper statutory authority, may impose reasonable regulations on motor vehicles operating for hire in its streets, and in doing so, may prescribe routes and schedules for

their operation; require the payment of a reasonable license fee; establish stands or termini and restrict their uses; require the furnishing of indemnifying bonds for the protection of persons and property resulting from their negligent operation; regulate the speed and manner of operation of such motor vehicles in the interest of public safety; require the use of taximeters and regulate the fares for the service. These municipal regulations are generally sustained by the courts when reasonable, and in the absence of regulation by the state, although the power of the municipality to make such regulations depends upon its statutory authority which varies in the different states. That the municipality may fix and define routes and schedules for motor vehicles, operating for hire within its streets, is established and discussed as follows in the case of *Huffman v. Columbia*, 146 S. Car. 436, 144 S. E. 157, where the court said: "The burden of the petition in this case is that the ordinance is unreasonable and confiscatory, because it requires the jitneys to operate on prescribed routes and schedules. So the question to be determined is: Has the city the right to route and schedule all forms of motor vehicle transportation over its streets? * * * We think that the city's right to route and schedule jitneys is fully sustained. * * * The above case, *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516, holds that there is no right to use a public highway in the operation of the business of a common carrier without consent of the state, and upholds the requirement of a proper indemnity bond. * * * We think the ordinance in question should be sustained. It is essential and necessary for the welfare of the city of Columbia that it have regulated public transportation operated upon regular routes and schedules. The city had the right to enact and enforce the ordinance in question. No one has the inherent right to carry on his private business along the public streets. Such rights can be exercised only under such terms and conditions imposed by the city authorities. The ordinance in question is reasonable and valid."

A municipality may require motor vehicles operating for hire to secure a license or permit for the purpose of doing so, and pay a reasonable fee to cover the expense of supervision. This principle is enunciated, and the reason on which it is based is discussed as follows in the case of *Ex parte Andrews*, 223 Mo. App. 358, 18 S. W. (2d) 580: "It is our opinion that there is a distinction between the 'license tax' mentioned in the first part of paragraph C of section 24 and the 'occupation tax' mentioned in

the proviso of said section, for said occupation tax is only due and payable when the owner of motor vehicles uses them for hire upon the streets of the city. * * * The ordinance attacked in this proceeding levies an occupation tax, and the city of Springfield is authorized by the general statutes, section 7976, R. S. 1919, to levy a tax on occupations, so having in mind the rules of construction heretofore mentioned, the wording of the particular part of the statute attacked therein, the definition of the word 'provided' and the general provisions of our statute, we are of the opinion that the legislature intended to say, and did say that, notwithstanding there is a provision in the first part of paragraph C in section 24 restricting the registration fee or license fee that a city may collect from the owner of a motor vehicle to one-half the amount of such fee collected by the state, yet the proviso written in said paragraph thereafter, has the effect of saying, and does say, that the limitation heretofore mentioned shall stand unless, or until, the city shall pass an ordinance providing for the collection of a tax for the use of its streets by users of motor vehicles for hire. In that sense the proviso is a restriction of the limitation mentioned in the first part of the paragraph that is, considering the entire paragraph it means, and says that such municipalities may not collect a license tax in excess of one-half of the registration fee collected by the state, with the understanding, however, if a motor vehicle owner elects to use his vehicle for hire upon the streets of the city, then, in that event, the city may by proper ordinance collect an occupation tax, and that the former provision in the statute does not prohibit municipalities from enacting ordinances providing means for collecting a tax from the users of motor vehicles if such use is the carrying of passengers for hire within the city limits."

That a municipal corporation may provide by ordinance that all taxicabs operating for hire upon its streets shall be equipped with taximeters, and that they may also be required to furnish an indemnity bond or provide liability insurance for damages which may result from the negligent operation of such taxicabs is established in *McGill v. St. Joseph*, 225 Mo. App. 1033, 38 S. W. (2d) 725, where the court said: "The city on June 14, 1929, passed an ordinance which provides that no one shall operate a taxicab for hire upon its streets unless there is affixed thereto a taximeter that will show the fare charged for service, nor operate a taxicab for hire upon its streets without filing with the city treasurer an indemnity bond or policy of liability insurance

in the amount specified in the ordinance, and conditioned for the payment of final judgments for personal injury or property damaged. * * * The rule is that the courts will not declare an ordinance unreasonable unless 'no difference of opinion can exist upon the question. A clear case must be made to authorize the courts to interfere on that ground.' * * * There are many cases in the books, some of them dealing with a statute and some of them with an ordinance, the provisions of which are substantially the same as the ordinance in question, and all of them hold that said provisions are not unreasonable. * * * We do not question the competency of the legislature to enact a law that would permit common carriers unrestrained use of the streets of municipalities as their only place of business and to conduct thereon a business dangerous to life and property, but, before we hold a law does so provide, it must be so plain and clear in its terms as to admit of no other reasonable construction."

While a municipality may require a license fee to be paid for the privilege of operating motor vehicles for hire within its streets, it may, and frequently does, exempt visitors to the city from the payment of this fee, as is indicated in the case of *State v. Perry*, 138 S. Car. 329, 136 S. E. 314, where the court said: "It is undisputed that the defendant was a resident of the city of Mount Pleasant, S. C., and that he was arrested in the city of Charleston, on August 12, 1925, while driving an automobile of a resident of that city. The defendant had no operator's license, as required by section 10 of the ordinance. * * * It is clear that the purpose of the ordinance is not to raise revenue, but to prevent incompetent and irresponsible persons from driving motor vehicles within the city. It is not disputed that the respondent has full general powers, under the provisions of its charter, for the enactment of such ordinances and the making of such regulations as may be necessary for the protection of the morals, health, and safety of the public. It seems to us that the charge of one dollar bears a reasonable relation to the expense that must necessarily arise in making the ordinance operative, as in the examination of the applicant for an operator's license and the issuance of the certificate. It is clear that the ordinance is intended to be merely a police regulatory measure. * * * The operation of motor vehicles under such conditions is a matter that demands careful supervision and control in the interest of public safety. The ordinance in question, under which the respondent endeavors to regulate its traffic, is nothing more

than a police regulatory measure, and the charge of one dollar, as we have already pointed out, does not change in any way the nature of the power exercised. * * * It is certainly not unreasonable, under present conditions of automobile travel, to exempt the cars of temporary visitors to the city from compliance with the traffic regulations under consideration."

As a means of regulating its street traffic under its police power, a municipality may require motor vehicles, operating for hire on its streets, to give bond or other security for the purpose of indemnifying persons who may sustain injuries to themselves or their property as a result of the negligent operation of such motor vehicles. That such a requirement, together with that of a license fee, which may be graduated according to the seating capacity of the motor vehicle, may be imposed is indicated as follows in the case of *Schlesinger v. Atlanta*, 161 Ga. 148, 129 S. E. 861: "The use of streets and highways is not absolute and unrestricted. Such use is subject to reasonable regulation by the public. So the operators of jitneys or buses on streets have been subjected to more or less stringent regulations. They can be required to give bonds to indemnify persons for injuries to their persons or property growing out of the negligent operation of these vehicles and to pay larger license fees than those imposed upon operators of taxicabs, and graded according to the seating capacity of the vehicles employed. * * * The conduct of the business of a carrier of passengers for hire over the streets of a city is a mere privilege, and not a natural or inherent right of the individual conducting such business. Being a privilege, it can be given or withheld, and may be given to members of one class and denied to those of another class. If the state or city determines that the use of the streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Constitution of the United States or this state which prohibits such action. * * * We do not think that the imposition of such tax and its payment would prevent a municipality from exercising authority previously granted to regulate or prohibit a business so taxed. There is no such repugnance between such authority previously conferred by the legislature upon a municipality and the passage of an act thereafter imposing such tax as would have the effect of repealing the authority so conferred upon the municipality. * * * With the wisdom of legislation within constitutional limits the courts have nothing to do. So we can not say that this ordinance violates this provision of the constitution."

While the municipality may require the payment of a reasonable fee for a license to operate a motor vehicle for hire, it may not impose a substantial tax for this privilege, especially where the state has already imposed such a tax, thereby withholding from the city the power to do so, for as the court said in the case of *Waycross v. Bell*, 169 Ga. 57, 149 S. E. 641: "Paragraph 75 of section 2 of the General Tax Act of 1927 (Ga. L. 1927, pp. 56, 80) imposes a tax 'upon every person, firm, or corporation, operating a motor bus for the transportation of passengers upon a regular or fixed route, (of) \$25.00 for each bus of a passenger capacity of seven or less, and on each bus of more than said capacity the sum of \$50.00; provided that they shall be exempt from local municipal license tax. * * * Construed in the light of the foregoing rulings, it is evident that the general assembly intended to relieve those engaged in the specified business or occupation from municipal license tax,' and thereby the municipality was forbidden to impose either a license fee or license or occupation tax upon the business of the defendants in error; and that portion of the tax ordinance of the municipality attempting to impose a tax upon the businesses exempted from municipal taxation by the general assembly was ineffectual and invalid. The ordinance of the municipality must yield to the higher authority of the legislature of the state. Having held that the plaintiffs were not subject to the provisions of the tax ordinance, by reason of the exemption contained in the general tax act of the legislature, under the well-settled rule that this court will abstain from passing on constitutional questions where such decision is not necessary in the adjudication, we shall not deal with the attacks made by the defendants in error upon the constitutionality of the tax ordinance now in question."

The operation of motor vehicles for hire is an extraordinary use of the street which may be prohibited or permitted upon such reasonable conditions as a municipality acting under legislative authority or the state itself may see fit to prescribe. The court sustained the requirement that taxicabs furnish indemnity for the payment of claims, established against them, for personal injuries in the interest of the general safety and public welfare. This principle, together with the reasons on which it is founded, is decided and discussed as follows in the case of *Weksler v. Collins*, 317 Ill. 132, 147 N. E. 797: "The state, and its municipal corporations under their delegated powers, may regulate the use of streets and highways where no merely arbitrary discriminations are made. The density and continuity of traffic upon the

streets of large cities justify measures to safeguard the public from the peculiar and additional dangers which arise out of the operation of motor vehicles in such cities. Streets are primarily devoted to use by the public in the ordinary way. The state may determine that such use of streets shall be preferred over their use by carriers for hire. The operation of vehicles in streets for purposes of gain is extraordinary and generally may be prohibited, or may be permitted upon such conditions as the legislature may prescribe. The power to exclude includes, for the most part, the power to permit upon conditions. * * * Taxicabs are operated for gain, and hence are in service during longer periods of the day and night over all streets, and usually at higher rates of speed than motor vehicles devoted solely to private pursuits, whether of business or pleasure. Motor trucks are operated principally in daylight, over fewer streets, and at lower speeds than taxicabs. The presence of taxicabs in the congested streets of large cities increases the probability of accidents and consequently of personal injuries. The legislature is vested with a broad discretion in making classifications in the interest of the public safety. The question of classification is primarily legislative and only becomes judicial when the legislative action is clearly unreasonable. * * * The right to require indemnity for the payment of valid claims for personal injuries, as explicit and extensive as that here required, has been recognized as reasonably incidental to the exercise of the police power of the state or municipality. *Nolen v. Riechman* (D. C.), 225 Fed. 812. * * * A personal surety bond under the act may be given and made effective without any regard to the provision concerning its recording and lien. That provision is void and must be rejected, but the rest of the act is complete in itself and must be sustained."

This same court in a later case expressly held that while a surety bond may properly be required from taxicabs operated for hire, a provision requiring that the bond be recorded and made a lien on the real estate of the surety was unreasonable and void, because it constituted an arbitrary discrimination, for as the court said in the case of *Checker Taxi Co. v. Collins*, 320 Ill. 605, 151 N. E. 675: "Every objection here made by appellant to the validity of sections 42a, 42b, 42c, and 42d of the Motor Vehicle Act of 1923 was presented to this court in the case of *Weksler v. Collins*, 147 N. E. 797, 317 Ill. 132, and in a very exhaustive decision this court held that all of them were valid and constitutional, with the exception of that part of subsection 42a which provides

for the recording and making a lien on the real estate of a personal surety where that form of a bond is offered. That part of section 42a of the Act with reference to the bond, and which is in this language, 'and such bond, for the full amount thereof shall, by its terms, be a lien for the benefit of the beneficiaries of said bond on such real estate so scheduled, and shall be recorded in the office of the recorder of deeds in each county in which such real estate is located,' was held to be an arbitrary discrimination, and unreasonable and void."

That an indemnifying bond or an insurance policy, guarantying the payment of any judgment secured against the operator or owner of motor vehicles for hire, may be required by a city in California is clearly indicated as follows in the case of *Severn v. California Highway Indemnity Exchange*, 100 Cal. App. 384, 280 Pac. 213: "It is plain that a municipality has the right within reasonable limits to prescribe the nature of a security to be given by those operating vehicles for hire upon its public streets, and there is nothing unreasonable in the provision of an ordinance requiring the operator of such a vehicle to protect the public by the bond or policy of insurance required therein and in the manner provided. * * * It is clear that the board of supervisors of the city and county of San Francisco intended to permit the execution of one or the other of two instruments, one of which was in the form of a bond expressly inuring to the benefit of all those persons who might be injured by the operation of a motor vehicle covered by the bond, and the other being an insurance policy guarantying the payment of any final judgment which should be recovered against the assured. If the driver of the automobile in which the plaintiff was injured had survived the accident, it could not be contended that the plaintiff could have proceeded directly against the defendant without having first secured a final judgment against the assured, although it has been suggested that the assured and the defendant might have been proceeded against in the same action. *Kruger v. California Highway Indemnity Exchange*, 201 Cal. 672, 258 Pac. 602. We do not think it can be conceded that the plaintiff would now have any greater rights against the defendant than she possessed prior to the death of the assured. Reading section No. 4 of the Ordinance, we do not think that the legislative intent was to create a primary liability against the insurance carrier. The use of the words 'final judgment' in subdivision (b) of section 4, appear in themselves to negative such intention, and the language of the insurance policy does not indicate an inten-

tion on the part of the insurance company to extend its obligations beyond the terms of the ordinance, but expresses, on the other hand, an intention that the liability of the carrier should not attach until the final judgment had been obtained."

Where the state has imposed the obligation of furnishing a bond or other security on motor vehicles, but has not conferred this power upon the municipality, its power to do so is not sustained in the case of *State v. Bates*, 161 Tenn. 211, 30 S. W. (2d) 248, for as the court said: "Since motor vehicles are instruments potential of danger to persons on the highways, and the right to operate them is not an unrestrained right, the state may regulate their use, and, as an incident of the regulation, provide reasonable means of indemnifying persons who are injured through their negligent operation. The regulation could be limited to those naturally coming within a particular class, without violating the rule against partial and discriminatory laws. *City of Memphis v. State ex rel.*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056; 42 C. J. pp. 666 and 711. And the legislature could, in the exercise of the police power, authorize municipalities to make similar reasonable regulations applicable to automobiles operated within the city limits, and the empowering act would not be void because confined to the municipality. *Triggally v. Mayor, etc.*, 6 Cold. 390. But no such regulation could be made by a municipality without statutory authority, and unless it was consistent with public policy and not at variance with the general laws of the state. * * * None of these acts authorize the municipality to exact security from those who operate automobiles to secure claims of persons injured by their use. * * * These provisions of the charter authorizing the board of city commissioners to regulate the running of automobiles and the persons in charge of them, as the language imports, refer to traffic rules regulating the speed and movement of automobiles about the city streets, and to the licensing of those who operate them. They do not confer the power upon the city to exact security for the benefit of passengers using automobiles whether kept for hire or otherwise, contrary to public policy of the state and in restraint of the use of automobiles taxed and licensed by the state, to provide revenue for use of the highways, under chapter 73, Pub. Acts 1917, chapter 149, Pub. Acts 1919, and chapter 108, Pub. Acts 1923. In none of the charter acts is there a suggestion that the additional regulation covered by the ordinance in question could be made by the municipality in restraint of the state's licensing power."

In fixing stands for motor vehicles operating for hire, a municipality may limit the use of these stands under its power to regulate and control its street traffic, for as the court said in the case of *Long's Baggage Transfer Co. v. Burford*, 144 Va. 339, 132 S. E. 355: "Persons desiring to use the streets to conduct a transportation business for private gain are on a different footing. No one has the right to conduct such business over the streets of the city without the permission of the municipal authorities. They have the right to grant such privilege to one and refuse another, or withhold it from all. If granted, they have the right to regulate it. Having the right to refuse defendants the privilege to use the streets for the conduct of a transportation business for private gain, it can not be said that an ordinance under which one of their competitors secured the assignment of private cab stands has deprived defendants of any interest or constitutional right to use the streets of the city.

* * * The ordinance in question, under which the private stands were established at the two Lynchburg hotels, operates in the public interest. It protects the rights of the abutting owner, and preserves to all licensed operators of cabs the right to receive and discharge passengers at said stands. The stands do not obstruct the use of the streets as public thoroughfares, and the assignment of the space to the complainant authorizes it to stand its cabs there while not in actual service, thereby enabling the traveling public to secure conveyances when desired from the hotels to the railroad stations and other parts of the city. We do not wish to be understood as deciding that the ordinance would be invalid without the clause requiring the written consent of the owner or person in control of the abutting property, provided it was so worded as to prevent interference with the rights of such abutting property owners. * * * In the instant case, the written consent of the abutting owners is required, but is worthless, unless the chief of police be of opinion that the public convenience will be best served by assigning the taxi stand at the location agreed upon by the applicant and such owner. The ordinance in the instant case can not be said to confer upon an abutting landowner the right to farm out for private profit the use of a public street, since his written consent, standing alone, confers no right or privilege upon the owner or operator of the motor vehicles. The ordinance makes the public convenience paramount. It is general in its terms, and applies to all owners or operators of motor vehicles doing business in the city. The successful applicant must, of course, be one who can bring himself within its terms, and the location of the stand

must be such as to serve the public convenience. Our conclusion is that the city of Lynchburg had full authority to regulate the location of taxi stands on its streets, and the ordinance is a valid and binding enactment by its council."

While a municipality may regulate its street traffic and designate the routes and termini of motor vehicles operating for hire in its streets, it has no authority in this connection to establish taxicab stands at railway stations, because this would amount to an appropriation of the railway's property without compensation; and under the theory of regulation, the municipality has no power to control the use and access of private property. This principle is clearly established and discussed as follows in the case of *Delaware, Lackawanna & Western R. Co. v. Morristown*, 276 U. S. 182, 72 L. ed. 523, 48 Sup. Ct. 276, P. U. R. 1928C, 414, where the court said: "The petitioner brought this suit claiming that the enforcement of the ordinance would take its property for municipal purposes without due process of law in contravention of the Fourteenth Amendment. In defense the respondents maintain that the establishment of the public hack stand does not amount to a taking of petitioner's property but is a mere traffic regulation that the town is authorized to make under the track elevation agreement and also by the exercise of its police power. * * * The town has not acquired by purchase or eminent domain any part of petitioner's land or the right to establish a public hack stand there. It is not claimed that the agreement expressly authorizes the town to make such an appropriation of petitioner's land. And there is nothing from which such a grant may be implied. * * * While petitioner owed its passengers the duty of providing a suitable way for them to reach and leave its station, it was not bound to allow cabmen or others to enter upon or use any part of its buildings or grounds to wait for fares or to solicit patronage. * * * The agreement does not empower the town so to appropriate petitioner's land. * * * The state may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment. * * * As against those not using it for the purpose of transportation, petitioner's railroad is private property in every legal sense. * * * There was no duty upon petitioner to accord to other taxicab men the use of its lands simply because it had granted Welsh the privileges specified in its contract with him. Petitioner is not bound to permit persons having no business with it to enter its

trains, stations or grounds to solicit trade or patronage for themselves; they have no right to use its property to carry on their own business. Petitioner had no contract relations with taxicab men other than Welsh and owed them no duty because they did not have any business with it. The enforcement of the ordinance here assailed would operate to deprive petitioner of the use of the land in question and hand it over to be used as a public hack stand by the individual defendants and others. As to them, and so far as concerns its use as a public hack stand, the driveway was petitioner's private property and could not be so appropriated in whole or in part except upon the payment of compensation. Under the guise of regulation, the town can not require any part of the driveway to be used in a service that petitioner is under no duty to furnish."

Reasonable conditions and requirements by way of the regulation of motor vehicles, operating as common carriers within its streets, may be imposed by municipal corporations, and the requirement of security covering liabilities for negligence are generally sustained as proper and reasonable regulations, as is indicated in the recent case of Hodge Drive-It-Yourself Co. v. Cincinnati, Ohio, — U. S. —, 76 L. ed. 323, 52 Sup. Ct. 144, where the court said: "This ordinance is not an interference with or regulation of a business that has no relation to matters of public concern; it rests upon the power of the city to prescribe the terms upon which it will permit the use of its streets to carry on business for gain. It does not attempt to impose any burden or duty that is peculiar to public utilities. * * * It merely requires the giving of security that lessees shall 'respond in damages for their own tortious acts.' 123 Ohio St. 293, 175 N. E. 196, 78 A. L. R. 525. There is no showing that the conditions imposed are arbitrarily burdensome or that the measure in any way operates to deprive appellants of property without due process of law. There is nothing on the face of the ordinance or in the evidence or findings below to warrant the conclusion that the classification, section 65-1b, is capricious, arbitrary or so lacking in foundation as to contravene the equal protection clause. The record fails to show that the enforcement of the ordinance does or will substantially discriminate against the business of appellants. The claim of repugnancy to the equality clause can not be supported by mere speculation or conjecture."

CHAPTER 26

REASONABLE REGULATIONS

Section	Section
645. Municipal control and rental charges.	658. Service connections integral part of equipment.
646. Concentration of service lines and poles.	659. Connections at expense of customer under municipal ownership.
647. Police regulations for underground conduits.	660. Liability for meter, etc., determined by provisions and construction of franchise.
648. Regulation of installation and supply of equipment.	661. Paving.
649. Meter and equipment provided with service.	662. Double tracks.
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651. Franchise provisions controlling if express and consistent.	664. Municipality obliged to preserve streets for travel.
652. Meter as a measure prevents waste.	665. Police power to regulate use of streets.
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654. Customer entitled to have service accurately measured.	667. Unreasonable to require service for all.
655. Municipality may tax meter rental to customer.	668. Collections.
656. Customers rather than taxpayers pay meter rentals.	669. Municipality requiring conduits limited to reasonable necessity.
657. Connections with premises included in rate charge.	670. Supervision.
	671. Production and prices—Waste.
	672. Private utilities.

§ 645. **Municipal control and rental charges.**—In the exercise of its right to make reasonable regulations for the municipal public utility, the municipality is permitted to control the manner in which the necessary equipment of such a system is installed so that it will not unreasonably obstruct the streets and other public places of the municipality nor interfere with the operation of its fire department nor obstruct the enjoyment by its inhabitants of their right to light, air and access to their places of business or residences any more than is necessary for the proper installation of the particular system of any municipal public utility. In the exercise of its police power and of its control over the streets and other public places as well as of its

statutory rights conferred upon it by the state or expressly reserved in its ordinances as conditions upon which it gave its consent to the use of its streets by the municipal public utility, the municipal corporation has the power to fix the location and control the manner of the installation by the municipal public utility of its equipment and to require the payment of a reasonable charge in the nature of a rental for the exclusive use of those parts of the street occupied by its poles, wires and other equipment or the payment of a special tax in the nature of a license fee for the erection and maintenance throughout the streets of the municipality of the necessary equipment to render municipal public utility service.

A reasonable occupation tax is not objectionable as being arbitrary and unreasonable because a particular person against whom it may be levied is conducting his business at a loss, for the question of reasonableness must be determined from its effect upon the class to which it is applicable, and not the individual for as the court said in the case of *Fitzgerald v. Gates*, 182 Ark. 655, 32 S. W. (2d) 634: "It was not alleged that the amount paid out for operating expenses of the business was not unreasonable nor more than was reasonably required for the operation thereof. In other words, appellant contends that the act 'as applied to his business' is arbitrary, unreasonable, oppressive, and confiscatory, and therefore invalid. He alleges, however, not that the general business required by the act to pay the tax, but only that his business was carried on at a loss, without consideration of the amount of the tax required to be paid, showing the revenues received and the expenses paid in the operation thereof. It is no longer questioned that the state has the power to levy such a privilege tax. * * * The reasonableness of an occupation tax does not depend on whether or not a hardship results in an isolated case, but instead upon the general operation of the tax in the class to which it applies. The amount of the tax is not to be measured by the profits of the business taxed, and the mere fact that the particular person taxed conducted his business at a loss does not of itself make a tax unreasonable."

§ 646. **Concentration of service lines and poles.**—The municipality may also require that its own wires and other equipment, necessary to the operation of its fire, police and other departments, be accommodated by the poles and conduits belonging to the equipment of the municipal public utility as a condition of the granting to it of the franchise rights, permitting it to main-

tain and operate its system and furnish its service. Indeed, the municipality may require that the same equipment of poles and conduits be used by all similar municipal public utilities on reasonable compensation being paid for them so far as their use by another company does not actually interfere with or interrupt the service rendered by the municipal public utility which installed the equipment for its own use.

§ 647. Police regulations for underground conduits.—Such a requirement comes within the proper exercise of the police power in preventing the useless duplication of equipment and the undue interference with the operation of the municipal fire department and the unnecessary obstruction of the view and interference with the right to light and access of the individual citizen and property owner, and for the same reason the municipality may require the municipal public utility to remove its overhead wires and place them in conduits beneath the surface. As the duty devolves on the municipality of regulating and controlling the streets in trust for the public, it can not devote them to any other inconsistent use, such as the erection in them of municipal buildings or other property of the municipality.

§ 648. Regulation of installation and supply of equipment.—In the exercise of its police power and in the performance of its duty to maintain the streets for the use of the public as a means of transportation and communication, for which they were originally dedicated and primarily intended, the municipality may require the municipal public utility installing its tracks and other equipment necessary to operate a street car system to lay but one track in certain portions of a street, although the franchise originally permitted the laying of a double track where its terms were modified to this effect within a reasonable time after the franchise was adopted. The municipality may also provide that the municipal public utility in the operation of its street car system may not attempt to carry more than a certain number of passengers in its cars and that sufficient equipment be furnished for the accommodation of the public as a condition of the fundamental requirement that the public be served adequately as well as at a reasonable rate.

As Y-switches are necessary equipment to the operation of a street railway, their installation can not be objected to by the abutting property owner where it does not appear that the location selected is arbitrary or unreasonable, for as the court said in the case of *Nuttle v. Wichita R. & Light Co.*, 123 Kans. 517,

256 Pac. 128: "Plaintiff has a \$20,000 residence in front of which this switch is to be constructed. But the switch has to be located in front of some man's property, and plaintiff has no greater claim to be freed from its noise than any other property owner. There are, indeed, some other street intersections thereabout where no fine residences are yet erected, but they will come along with the continued growth of the city, and, if a noisy street railway switch is a nuisance, it would hardly be just to construct it in front of some other worthy citizen's home-site thereabout rather than in front of plaintiff's merely because the other man has not yet gotten his house built. A Y-switch is an incidental but essential requisite to the operation of a street railway, and the noise attendant on its operation is simply one of the inconveniences which inevitably attend the establishment of a residence in a city where street railways are lawfully permitted to construct and operate their transportation facilities."

Under its power to regulate the service of the public utility and its use of the streets and the operation of its equipment therein, a municipality may regulate the operation of street cars to the extent necessary for the safety and convenience of the public. Under its police power, however, it may not so far interfere with the management and operation of a street railway system as to prohibit the operation of street cars in charge of one man rather than two where such a requirement would be unreasonable, because of the expense involved and for the further reason that it did not appear that such a regulation would secure greater safety or convenience. This principle and the effect of its application in a particular instance are discussed as follows in the case of *Shreveport R. Co. v. Shreveport, Louisiana*, 37 Fed. (2d) 910, where the court said: "This suit was brought to enjoin the city of Shreveport, its officers and agents, from enforcing certain ordinances prohibiting the operation of street cars on all but two of plaintiff's lines without using both a conductor and motorman, or what is commonly termed two-man cars. * * * That, if the company is permitted to operate its cars with one man, the same will result ultimately in a saving at the present rate of wages, of \$93,921.92 per year; that the company at present has no credit, and, but for the personal indorsement of its stockholders, could not raise funds to continue operation. * * * That, according to figures compiled by the American Electric Railways Association, the number of accidents of all kinds per 10,000,000 car miles, reported by thirty-one companies operating all one-man cars, was 46.07% less than those reported by fifty-

seven companies operating all two-man cars, or both two-man and one-man cars; that the ratio between the same companies on the same basis, as to collisions with motor vehicles, was 66.6 in favor of the one-man cars, and that all other classes of accidents showed a decrease. * * * The Master finds from the evidence since 1917, the operation of one-man cars has been approved by the public service commissions of those states in the Union in which such cases have come before such commissions having jurisdiction of the question presented, and where one-man operation has been under attack; and since said year no public service commission has refused to permit the operation of such cars, and since 1924, no commission has limited the right to use one-man cars subject to any particular conditions. * * * As to the number of one-man cars now operating in the United States, it is shown that out of an approximate total of 80,000 street cars now being operated, about 30,000 of these are of the one-man type (Beck, 291); and that in cities having a population of more than 81,000, there are now some 16,027 one-man cars in operation as against 87 in 1917. * * * It is common knowledge that the automobile has seriously affected the earnings of street railroads all over the country, and, as stated by the master, no public service commission in any state where the question comes under its jurisdiction now refuses to permit the use of one-man safety cars. * * * A municipality's right under its police power to interfere in matters of this kind exists only when necessary to the safety and convenience of the public. The philosophy of our institutions warrants reasonable regulations only, and there must be some real justification for the exercise of the power. We know that thousands of buses have taken the place of street cars, and are being operated over the most populous sections of cities with the use of only one man. This type of conveyance is not confined to a fixed track, and hence is more liable to collision with other motor vehicles and traffic upon the streets. * * * Street cars, for the present at least, appear to be an essential means of transportation for a large portion of the population of cities, particularly among those not able to own automobiles and the working class, and the loss of such service without an equally cheap substitute would be a serious handicap to a growing city. * * * On the whole, I believe the refusal to allow the use of one-man cars of the latest type, with all modern appliances for safety, at least until they can be properly tested, in the light of the proved experience of other cities, is arbitrary, and amounts to a taking of plaintiff's property without

due process of law, results in confiscation, and the enforcement of the ordinances complained of will be enjoined."

§ 649. **Meter and equipment provided with service.**—Where the municipal public utility is required to furnish its service at a fixed rate, a number of decisions have held that it must provide the necessary meters or other equipment at its own expense for the purpose of measuring the service rendered, although other cases, especially where the municipality is furnishing the municipal public utility service, have held that the customer may be required to pay the expense of putting in the service pipes and a reasonable rental for the use of the meter, which not only measures the service rendered, but tends to prevent the extravagant use or needless waste of the service. As the meter is the best known method of determining the amount of service the customer receives, its use redounds to his own advantage over the payment of a flat rate for the service by which the careful and conservative customer is obliged to pay the same as the extravagant and careless one.

Where under its franchise a public utility is required to furnish water for the use of the city and its inhabitants and, in connection with such service, it appears that meters are necessary, the public utility is not only authorized but required to furnish meters, notwithstanding a provision in the statutes providing for a public service commission to the effect "that nothing in the act should direct or should permit the installation of mechanical water meters." In holding that this provision does not prohibit the installation of meters by a waterworks company for the purpose of measuring its service in ascertaining the charges therefor, the court expressed the rule as follows in the case of *Reno, Nevada v. Sierra Pacific Power Co.*, 44 Fed. (2d) 281: "The state legislation providing for the public service commission did not expressly prohibit public utility corporations from exercising their right, if any they had, to establish such meters. It authorized public utilities to act in the matter of the measuring of water and the regulation for such service, and particularly to measure the water in case of individual complaints, and in that connection enacted the proviso hereinabove set forth, that nothing in the act should direct or should permit the installation of mechanical water meters. It does not prohibit the installation of such mechanical water meters. The most that can be said concerning the matter is that the public service commission may be thereby prohibited from authorizing, requiring, or affirmatively permitting the installation of water meters, although upon

this question we express no opinion. It is sufficient for the purpose of this appeal to again call attention to the fact that the statute does not either expressly or by implication purport to prohibit the installation of mechanical water meters. It should also be observed in this case that we have here no prohibition by the state legislature, none by the public service commission, in which it is conceded jurisdiction has been vested by the state to regulate public utilities to the exclusion of the city; nor have we any action by the legislative authority of the city, if it has any power in the matter, in reference to the installation of water meters in the city of Reno. * * * In view of the allegation of the complaint that the installation of water meters as established and proposed by the appellee is a necessary incident to the conduct of the business of supplying water for the citizens of Reno, the complaint states a cause of action for injunctive relief, for the reason that, if such installation is necessary for such purposes, it is not only authorized but is required by the duties imposed upon the appellant by virtue of the obligations it has assumed in the exercise of franchise rights in the city of Reno. It is true that the terms of the appellant's franchise are not set forth in the complaint, but under the allegations thereof we must assume on this appeal that appellant has the right, and is under obligation, to furnish water to the citizens of Reno, and that it has the right for that purpose to use the public streets of that city so far as necessary for that purpose. * * * The complaint states a cause of action, and the order for temporary injunction was within the discretion of the trial court."

§ 650. Expense of meter and connections met by customer, not by municipality.—In case the municipality furnishes the municipal public utility service the meter rental as well as the expense of installing the service, and even the main pipes, is perhaps more equitably imposed upon the customer or the abutting property owner who receives the service or whose property is enhanced by the fact that it is available rather than upon the taxpayer or all the inhabitants, some of whom do not receive the service nor derive any benefit from it as abutting property owners, except that as citizens they are at least indirectly benefited from the public water supply and the services of the fire department as well as from the fact that the streets and public places of the city are lighted as a form of police protection. Although each inhabitant generally has the right to contract directly for municipal public utility service, this does not require that the municipal public utility shall install as many individual service

pipes for any structure as there may be rooms or tenants occupying but one or two rooms, because the expense of doing so would make the requirement an unreasonable one in view of the alternative which is equally available that single service be furnished the structure and its owner distribute the expense among his tenants.

Where the franchise provides that a meter shall be installed in each dwelling-house or a flat rate paid for each dwelling-house, in the case of apartment houses a meter may be installed for each apartment, as is indicated in the case of *Maysville Water Co. v. Stockton*, 221 Ky. 610, 299 S. W. 582, where the court said: "In cases of doubt such ordinances must be construed in favor of the property owner. No rights will be presumed to be granted, except those specified, or fairly to be implied from what is granted. A right claimed by the water company can not be implied from the mere silence of the ordinance. * * * It is still a dwelling-house, though the owner may live in one part of it and another family in another part. It thus becomes two dwellings, but it is only one dwelling-house. The unit for the flat rate is the dwelling-house. A man owning an entire block can not put up eight houses on it and demand a single meter rate for all of them, as he owns them all. The unit is the 'dwelling-house,' and, there being eight dwelling-houses, the flat rate must be paid on each dwelling-house. If, however, he builds one apartment house on the block, covering the whole block, and forty families have their dwellings in it, there is still but one house on the block, though it houses forty families, it is not forty dwelling-houses. The apartment building, which was unknown in the city when the ordinance was passed, is not covered by the flat-rate provisions of the ordinance. The owner may at his cost put in a meter and pay at meter rates, where he uses the required amount of water. Appellee's house contains eight dwellings, but it is not eight 'dwelling-houses.' It is one house, used by eight families. * * * In this case the apartment building is a structure not named in the ordinance, and not within the contemplation of the parties in any of the specifications of the ordinance, and is therefore governed by the meter rate."

In lieu of a meter rental charge or the charge for the meter itself being imposed upon the customer, the public utility may require a small deposit from prospective customers, who are not financially responsible, to insure payment for the service when it is given, for as the court said in the case of *Riegel v. Public Utilities Comm.*, 48 Fed. (2d) 1023: "The suit was begun for the

purpose of having declared unlawful an order of the public utilities commission of the District of Columbia authorizing and approving the rules and practice of certain of the utilities companies operating in the District in requiring a small deposit from customers who were not able to establish financial responsibility when applying for service. The order is challenged on the ground that the rule is discriminatory and therefore contrary to certain sections of the law creating the public utilities commission (37 Stats. 974 [D. C. Code 1930, section 1 et seq.]). We think this contention wholly without merit. The only purpose of the rule is to assure payment by the customer or subscriber for the service which he gets. This the utility, like any other business organization, has a right to demand in advance if it wishes."

§ 651. **Franchise provisions controlling if express and consistent.**—Whether the expense of connecting the premises with the street main can reasonably be imposed upon the consumer is determined by the provisions of the franchise or the terms of the contract of the municipal public utility providing the service, although where this item is not expressly stipulated for and the municipal public utility undertakes to render service at a fixed rate it is generally held liable for the cost of installing all the equipment necessary to furnish the service within that rate, including the service pipes, meters and the like. Where, however, the municipality furnishes the municipal public utility service or the ordinance specifies that such expenses as meters and connecting the main with the premises shall be borne by the customer, he is required to install the service connections and such equipment and keep them in repair at his own expense, unless this is contrary to the contract or inconsistent with statutory regulations.¹

¹ United States. St. Louis, Missouri v. Western Union Tel. Co., 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. 990; Baltimore, Maryland v. Baltimore Trust &c. Co., 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. 696; Postal Tel.-Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. 208; Western Union Tel. Co. v. Richmond, Virginia, 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. 449; Grand Trunk Western R. Co. v. South Bend, Indiana, 227 U. S. 544, 57 L. ed. 633, 33 Sup. Ct. 303, 44 L. R. A. (N. S.) 405; Southwestern Tel. & T. Co. v. Danaher, 238 U. S. 482, 59 L. ed.

1419, 35 Sup. Ct. 886, L. R. A. 1916A, 1208; Postal Tel.-Cable Co. v. Richmond, Virginia, 249 U. S. 252, 63 L. ed. 590, 39 Sup. Ct. 265; Durham Public Service Co. v. Durham, North Carolina, 261 U. S. 149, 67 L. ed. 580, 43 Sup. Ct. 290; Puget Sound Power &c. Co. v. King County, Washington, 264 U. S. 22, 68 L. ed. 541, 44 Sup. Ct. 261; Packard v. Banton, 264 U. S. 140, 68 L. ed. 596, 44 Sup. Ct. 257; New York, Philadelphia &c. Tel. Co. v. Dolan, 265 U. S. 96, 68 L. ed. 916, 44 Sup. Ct. 450; Pacific Gas &c. Co. v. San Francisco, California, 265 U. S. 403, 68

L. ed. 1075, P. U. R. 1924D, 817; Fort Smith Light & Co. v. Bourland, 267 U. S. 330, 69 L. ed. 631, 45 Sup. Ct. 249, rehearing denied and opinion amended in 268 U. S. 676, 69 L. ed. 631, 45 Sup. Ct. 511; Benton v. Belt Line R. Corp., 268 U. S. 413, 69 L. ed. 1020, 45 Sup. Ct. 534, P. U. R. 1926A, 817; People v. Public Service Comm. of New York, 269 U. S. 244, 70 L. ed. 255, 46 Sup. Ct. 83; Cole v. Norborne Land & Drainage Dist., 270 U. S. 45, 70 L. ed. 463, 46 Sup. Ct. 196; Smith v. Illinois Bell Tel. Co., 270 U. S. 587, 70 L. ed. 747, 46 Sup. Ct. 408, P. U. R. 1926C, 754; Public Utilities Comm. of Rhode Island v. Attleboro Steam & Co., 273 U. S. 83, 71 L. ed. 549, 47 Sup. Ct. 294, P. U. C. 1927B, 348; Hope Nat. Gas Co. v. Hall, 274 U. S. 284, 71 L. ed. 1049, 47 Sup. Ct. 639; Hess v. Pawloski, 274 U. S. 352, 71 L. ed. 1091, 47 Sup. Ct. 632; Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 Sup. Ct. 702, P. U. R. 1927D, 346; State of Washington v. Kuykendall, 275 U. S. 207, 72 L. ed. 241, 48 Sup. Ct. 41; Hopkins v. Southern California Tel. Co., 275 U. S. 393, 72 L. ed. 329, 48 Sup. Ct. 180; Wuchter v. Pizzutti, 276 U. S. 13, 72 L. ed. 446, 48 Sup. Ct. 259; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551, 48 Sup. Ct. 230, P. U. R. 1928C, 144; Louisville Gas & Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 Sup. Ct. 423; Sprout v. South Bend, Indiana, 277 U. S. 163, 72 L. ed. 833, 47 Sup. Ct. 502; Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 Sup. Ct. 545; Quaker City Cab Co. v. State of Pennsylvania, 277 U. S. 389, 72 L. ed. 927, 48 Sup. Ct. 553; Williams v. Standard Oil Co., 278 U. S. 235, 73 L. ed. 287, 49 Sup. Ct. 115, P. U. R. 1929A, 450; Larson v. State of South Dakota, 278 U. S. 429, 73 L. ed. 441, 49 Sup. Ct. 196; Frost v. Corporation Comm. of Oklahoma, 278 U. S. 515, 73 L. ed. 483, 49 Sup. Ct. 235, P. U. R. 1929B, 634; Helson v. Commonwealth of Kentucky, 279 U. S. 245, 73 L. ed. 683, 49 Sup. Ct. 279; Bekins Van Lines v. Riley, 280

U. S. 80, 74 L. ed. 178, 50 Sup. Ct. 64; Silver v. Silver, 280 U. S. 117, 74 L. ed. 221, 50 Sup. Ct. 57; New Jersey Bell Tel. Co. v. State Board of Taxes & Assessments, 280 U. S. 338, 74 L. ed. 463, 50 Sup. Ct. 111; District of Columbia v. Fred, 281 U. S. 49, 74 L. ed. 694, 50 Sup. Ct. 163; Carley v. Hamilton, Inc. v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 Sup. Ct. 204; New Orleans Public Service v. New Orleans, Louisiana, 281 U. S. 682, 74 L. ed. 1115, 50 Sup. Ct. 449; Corporation Comm. of Oklahoma v. Lowe, 281 U. S. 431, 74 L. ed. 945, 50 Sup. Ct. 399; Storaasli v. State of Minnesota, 283 U. S. 57, 75 L. ed. 839, 51 Sup. Ct. 354; Interstate Transit Inc. v. Lindsey, 283 U. S. 183, 75 L. ed. 953, 51 Sup. Ct. 380; Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353, 75 L. ed. 1112, 51 Sup. Ct. 476, P. U. R. 1931D, 221; Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264, 51 Sup. Ct. 582, P. U. R. 1931C, 448; McBoyle v. United States, 283 U. S. 25, 75 L. ed. 816, 51 Sup. Ct. 340; East Ohio Gas Co. v. Tax Comm. of Ohio, 283 U. S. 1171, 75 L. ed. 700, 51 Sup. Ct. 499; State Tax Comm. v. Interstate Nat. Gas Co., — U. S. —, 76 L. ed. 156, 52 Sup. Ct. 62; Bandini Petroleum Co. v. Superior Court, — U. S. —, 76 L. ed. 186, 52 Sup. Ct. 103; Hodge Drive-It-Yourself Co. v. Cincinnati, Ohio, — U. S. —, 76 L. ed. 323, 52 Sup. Ct. 144; Eastern Air Transport Co. v. South Carolina Tax Comm., — U. S. —, 76 L. ed. 673, 52 Sup. Ct. 340; Railway Express Agency, Inc. v. State of Virginia, 282 U. S. 440, 75 L. ed. 450, 51 Sup. Ct. 201, P. U. R. 1931B, 223; Champion Ref. Co. v. Corporation Comm. of Oklahoma, — U. S. —, 76 L. ed. 1062, 52 Sup. Ct. 559; Utah Power & Co. v. Pfost, — U. S. —, 76 L. ed. 1038, 52 Sup. Ct. 548; Sproles v. Binford, — U. S. —, 76 L. ed. 1167, 52 Sup. Ct. 581; Continental Baking Co. v. Woodring, — U. S. —, 76 L. ed. 1155, 52 Sup. Ct. 595.

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20 Fed. (2d) 87, *writ of cert. denied* in 275 U. S. 553, 72 L. ed. 422, 48 Sup. Ct. 115; *Adams v. Decoto*, 21 Fed. (2d) 221, P. U. R. 1927E, 714; *Oxford Oil Co. v. Atlanta Oil Producing Co.*, 22 Fed. (2d) 597, *writ of cert. denied* in 277 U. S. 585, 72 L. ed. 1000, 48 Sup. Ct. 433; *United States Light & C. Corp. v. Niagara Falls Gas & C. Co.*, 23 Fed. (2d) 719, P. U. R. 1927E, 749, P. U. R. 1931B, 127; *White v. Federal Radio Comm.*, 29 Fed. (2d) 113; *United States v. American Bond & C. Co.*, 31 Fed. (2d) 448; *Tomich v. Union Trust Co.*, 31 Fed. (2d) 515; *General Elec. Co. v. Federal Radio Comm.*, 31 Fed. (2d) 630, P. U. R. 1929D, 321, *writ of cert. denied* in 281 U. S. 464, 74 L. ed. 969, 50 Sup. Ct. 389; *Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co.*, 33 Fed. (2d) 770, P. U. R. 1929E, 260, *affd.* in 45 Fed. (2d) 995, P. U. R. 1931B, 401; *Richmond Development Corp. v. Federal Radio Comm.*, 35 Fed. (2d) 883; *New York v. Federal Radio Comm.*, 36 Fed. (2d) 116, 59 App. D. C. 129, *writ of cert. denied* in 281 U. S. 729, 74 L. ed. 1146, 50 Sup. Ct. 246; *Atlanta-Pacific Stages, Inc. v. Stahl*, 36 Fed. (2d) 260, P. U. R. 1930B, 411; *Shreveport R. Co. v. Shreveport, Louisiana*, 37 Fed. (2d) 910; *Great Lakes Broadcasting Co. v. Federal Radio Comm.*, 37 Fed. (2d) 993, *writ of cert. dis.* in 281 U. S. 706, 74 L. ed. 1129, 50 Sup. Ct. 467; *Illinois Bell Tel. Co. v. Moynihan*, 38 Fed. (2d) 77, P. U. R. 1930B, 148, *mod. and remanded* in *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 75 L. ed. 255, 51 Sup. Ct. 65; *Florida Power & Light Co. v. Atlantic Gulf & C. Co.*, 38 Fed. (2d) 948; *Southern Motorways, Inc. v. Perry*, 39 Fed. (2d) 145, P. U. R. 1930C, 131; *Great Falls Gas Co. v. Public Service Comm. of Montana*, 39 Fed. (2d) 176, P. U. R. 1930D, 209; *Harris Trust & C. Bank v. Chicago R. Co.*, 39 Fed. (2d) 958; *Bailey v. Smith*, 40 Fed. (2d) 958; *Chicago Federation of Labor v. Federal Radio Comm.*, 41 Fed. (2d) 422; *District of Columbia v. Georgetown & C. R.*

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§ 652. **Meter as a measure prevents waste.**—The municipal public utility being engaged in a business of public nature, in return for the special privileges granted, is bound to serve any member of the public who makes proper application for service in accordance with reasonable rules and regulations. The meter is the most efficient method yet devised for accurately measuring the quantity of such municipal public utility service as gas, water and electricity. The meter also prevents the extravagant use or needless waste of such service which frequently occurs where the flat rate is the method employed for determining the amount due for the service. Because the meter is a useful, if not indeed an essential part of the municipal public utility equipment, the company may be required to furnish it at its own expense, and where this is expressly stipulated or where a maximum charge for the service is fixed, the courts have held that the company may not collect a rental for the use of its meters in addition to the maximum rate allowed it for the service, for as the court in the case of *Buffalo v. Buffalo Gas Co.*, 81 App. Div. 505, 80 N. Y. S. 1093, decided in 1903, said: "Not only is the consumer entitled to be protected against imposition by some safe method of measuring the quantity which he uses, but it is essential and necessary for the gas company itself that such measurement and test should be accurate. Having in mind these facts, the law in question in effect provides that the consumer shall be supplied with a meter, and that the same shall not only be furnished by the company without charge, but that it shall be inspected by officials designated for that purpose. The object of these provisions is very plain. They contemplate that the gas company desiring to engage in such business shall not take advantage of its customers, either by supplying an untrue meter or by making them pay for the ordinary method of determining what has been consumed. We think such provisions are clearly within the power conferred upon the legislature to enact those laws for the public and general welfare which are ordinarily known as police regulations."

That meters for water users are reasonable requirements and mutually beneficial to both parties is clearly indicated in the case of *Richardson v. Greensboro*, 174 N. Car. 540, 94 S. E. 3, where the court said: "We see no force in the contention that this ordinance is unreasonable and void. On the contrary, it appears to be a very wholesome check upon the flat-rate consumers to

waukee v. Milwaukee Elec. R. &c. (Wis.), 240 N. W. 411, P. U. R. Co. (Wis.), 237 N. W. 64; *Wisconsin Tel. Co. v. Public Service Comm.* 1932B, 195.

prevent the wasteful and extravagant use of water. We think there is nothing unreasonable in requiring a citizen, who has voluntarily given up the flat rate and compelled the defendants to put in a meter, to adhere to the water rate. If he were permitted to change his mind every month, the city could be put to much inconvenience and expense. There is no claim that the charge for water as measured by a meter is unreasonable, and that method is certainly as fair as can be devised, for under it a customer pays only for what he consumes. If he is wasteful and extravagant in the use of water the loss falls on him, whereas under the flat rate it falls on the city. Unless the city authorities are permitted to exercise some reasonable control over those who use the flat rate, that system may be grossly abused. These matters are purely administrative, and must of necessity be left to the sound discretion of the municipal authorities. It is well settled that there is not necessarily any discrimination because meter rates are charged against certain consumers and flat rates against other consumers of the same class, nor because small consumers are charged by the room and large consumers according to the quantity of water used."

That a minimum charge for service or a readiness to serve in lieu of a charge for meter rentals is permissible is well stated in the case of *Donnell v. Brockman*, 117 Ark. 132, 173 S. W. 843: "Of course appellee was bound by the terms of his franchise and could not make a higher charge for electricity than that fixed therein, under the terms prescribed. It is a well-nigh universal custom, however, for operators of electric lighting plants to establish and demand a minimum service fee, or readiness to serve charge of all consumers using meters. The ordinance by its terms authorizes the parties to agree upon the use of a meter and provides, when such meter is used, the rate charged shall not exceed fifteen cents per kilowatt. It is also true that under the terms of the ordinance, if no meter was used, appellant would have been required to pay a much greater sum per month for the lights in his house than the amount demanded by appellee. The franchise permits the parties to agree upon the use of a meter, and, although it limits the rate to be charged for electricity consumed when a meter is used to not exceeding fifteen cents per kilowatt, it does not prohibit the right to contract or agree to pay so much per month as a minimum fee or a readiness to serve charge for the use of the meter, nor to agree that the consumer will pay for so much electricity each month at the prescribed rate, whether that amount be consumed or not, and such agree-

ment would not conflict with the provisions of the ordinance limiting the rate to be charged to not exceeding fifteen cents per kilowatt."

An improved type of electric switch, having an accessible fuse which is safer and more convenient to operate than the type being used, may be required in the interest of safety, as is indicated by the court in the case of *Wiegand v. Alabama Power Co.*, 220 Ala. 620, 127 So. 206, P. U. R. 1930C, 126: "It was established without dispute that the type of switch sold and installed by complainant for his customers met the requirements of the Southeastern Underwriters' Association, with which the city of Anniston was satisfied, and that the city inspector issued his certificate therefor. * * * Defendant further insists that its requirement of the new type of switch is not only in keeping with the foregoing order, but also in compliance with its general duty to its employees and to the public. * * * The new is referred to as the 'accessible fuse type switch,' which does not require the opening of the door to the switch box to replace a blown fuse, as is necessary in the old type. In the new type a lever operates on the outside of the switch box which blockades a sliding door on the front covering up the fuses and rendering them 'dead' and void of danger. This renders fire less likely. Its chief virtue, however, appears from the evidence to be better protection to human life. In the new type there is no danger of a person receiving a shock from replacement of a fuse, while there are possibilities of coming in contact with 'live parts' in the old. The evidence is further to the effect that the theft of electric current has become a matter of serious concern to public utilities, and another advantage of the new type over the old appears to be the fact that the new switch is sealed. * * * The chancellor found, as stated in the opinion accompanying his decree, that the enforcement of defendant's rule as to the new type of switch will work no damage to complainant's business, that no restraint of trade is made to appear, and that said new type is available in the general market from several electric jobbers in that territory. The chancellor further concluded that the rule promulgated was a reasonable requirement. * * * We are not persuaded the finding of the trial court on the facts is plainly wrong. On the contrary, we are of the opinion his conclusion is fully and amply supported by the evidence. The defendant, as a public service corporation, is obligated, independently of any statute, to treat all members of the public that it has held itself out as serving fairly and without discrimination.

* * * But, as a condition precedent to such service, the applicant must conform to reasonable rules and regulations imposed."

§ 653. **Meter rental included in price fixed for service.**—The company may not collect a rental for the use of its meters where it is charging a maximum rate specified for its service, because if it did so it would exceed the amount allowed it, and also because it is its duty in connection with providing its service to measure the amount of the service furnished and render a statement of the account as the basis of payment for the customer, for as the court in the case of *Louisville Gas Co. v. Dulaney*, 100 Ky. 405, 18 Ky. L. 849, 38 S. W. 703, 36 L. R. A. 125, decided in 1897, said: "While the consumer may cause it to be inspected, and may test the accuracy of its work, his concern is only to ascertain and pay for what gas he has consumed, and he can not be called on to pay for the apparatus used in its measurement, any more than he can be made to pay for the machinery used in its manufacture. He is required to pay the legal rate for the quantity consumed, and this quantity must be ascertained by the company by some correct method. The company can only charge for the quantity it actually furnishes, and to ascertain what it furnishes it must measure it. How, the consumer does not care, so it is measured correctly. The appellees therefore are entitled to have their gas furnished to them already measured, and for it, so measured, they can be made to pay at the price of \$1.35 per 1,000 feet, and no more. If the price of gas were unrestricted in the organic law of the corporation, the rule charging a higher price to small consumers might be upheld."

Meters as a part of the necessary equipment to measure and furnish the service can not properly be chargeable to the consumer, for as the court said in *McIninch v. Auburn Mut. Lighting & Power Co.*, 99 Nebr. 582, 156 N. W. 1075: "So far as we can see, the defendant was obliged to put in the meters when requested to do so. It was a burden which the defendant assumed when the ordinance was passed, and it accepted it. The plaintiff requested defendant to put in the meter. * * * The court said the fact that the water company had the right to charge and collect by measurement fixed the matter of furnishing the meter, and the company had to do it. When the article sold is sold by measurement, the only practicable way in which to ascertain the quantity sold is by the use of a meter. This would imply that the meter is part of the necessary equipment of the company. * * * An electric light plant in the

position of the defendant in this case becomes a public service corporation whenever the ordinance is passed and its terms are accepted. There seems to be no provision in the ordinance that the company has any authority to collect for the use of meters or to demand a deposit in place of the meter. We can not add to the conditions of the contract."

§ 654. **Customer entitled to have service accurately measured.**—The courts will enjoin the municipal public utility from discontinuing its service on the refusal of the customer to pay an arbitrary amount fixed by the municipal public utility without accurately determining the amount of the service by the use of the meter, for as the court in the case of *Smith v. Birmingham Waterworks Co.*, 104 Ala. 315, 16 So. 123, decided in 1894, said: "In all cases where the defendant has the right to charge for water by measurement, and demand pay for water furnished, it is incumbent on the respondent to furnish meters. There is no authority given to the respondent to refuse to furnish meters, and fix an arbitrary price, where water is to be paid for by measurement, and unless payment is made according to such arbitrary rate, to cut off the supply of water. The damage in such a case would be irreparable, and a court of equity would not hesitate to interfere by injunction."

§ 655. **Municipality may tax meter rental to customer.**—However, where the municipality itself is furnishing the municipal public utility service, it may provide that the expense of the meter shall be paid by the customer, where this is not in conflict with any regulation by the state, for as the court in the case of *Shaw Stocking Co. v. Lowell*, 199 Mass. 118, 85 N. E. 90, 18 L. R. A. (N. S.) 746, decided in 1908, said: "The principal object of the defendant's water board in requiring fire-service pipes to be metered is to prevent the surreptitious or careless withdrawal of water through such pipes for other purposes than the extinguishment of fires; another object is to procure the measurement by meter of all water consumed for any purpose in order to check wastage and to require each taker to pay for the exact quantity of water furnished to him. The requirement is well adapted to aid in accomplishing these objects; and this is none the less so, although its operation sometimes may be circumvented by some fraudulent device. The regulation must be regarded as reasonable, unless some of the plaintiff's specific objections to it can be sustained."

This principle requiring the customer to bear the expense of the meter is fully set forth in the case of *Farkas v. Albany*, 141 Ga. 833, 82 S. E. 144, L. R. A. 1915A, 320, Ann. Cas. 1915C, 1195, where the court said: "Where a municipal corporation owns and maintains waterworks, it may, under proper legislative authority in its charter, require that consumers shall, at their own expense, provide meters; or, if the charter so authorizes, it may install the meters at the expense of the consumers. This is supported by what we consider the better reasoned cases. *State v. Gosnell*, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33; *Cooper v. Goodland*, 80 Kans. 121, 102 Pac. 244, 23 L. R. A. (N. S.) 410; *Mallon v. Board of Water Commissioners*, 144 Mo. App. 104, 128 S. W. 764; *Anderson v. Village of Berwyn*, 135 Ill. App. 8; *Sackett v. City of Morris*, 149 Ill. App. 152; *Powell v. City of Duluth*, 91 Minn. 53, 97 N. W. 450; *Dillon, Municipal Corporations* (5th ed.), section 1320, 3 Abb. Municipal Corporations, section 893.

* * * While there may be some conflict in the authority on the subject of the power of municipal corporations, or public service corporations, to require the installation of water meters at the expense of the consumers, it will be found to a large extent that this apparent conflict is based upon the construction of special statutes involved in different cases, under which the power was claimed. * * * As to municipal corporations owning and maintaining waterworks, it has generally been assumed that the legislature could confer the authority to require the consumer to bear the expense of providing a meter; but the question has been: What had the legislature actually done in a given case? The language used in the discussions must be considered with reference to the point involved. Thus, rulings that waterworks companies, which have been granted a franchise to furnish citizens with water measured by the gallon, must generally provide the means of making the measurement, and similar cases, do not deny to a municipal corporation owning waterworks the right to require consumers to furnish meters at their own expense, if its charter so authorizes. * * * The consumer takes the water whenever he likes, and in whatever quantity he likes. It is therefore not a great injustice if the city requires him to provide the means for measuring the amount taken by him, in such a manner as to reasonably protect itself and the general public against waste of the common water supply, and against false measurements and false reports on the part of the consumer. This is accomplished by means of a meter. It may be that the dominant purpose of its installation is to

protect the city. But it may also have a beneficial use to the consumer, in that he is only charged for the water which he consumes."

§ 656. **Customers rather than taxpayers pay meter rentals.**—It has been decided that the customer is the proper party to pay for the meter where the municipality furnishes the service for the further reason that in case the municipality furnished the meters, the expense of doing so would be met by all the taxpayers, some of whom would not be consumers of the service, for as the court in the case of *Cooper v. Goodland*, 80 Kans. 121, 102 Pac. 244, 23 L. R. A. (N. S.) 410, decided in 1909, said: "It is evident that the only fair basis of fixing the amount which the individual customer should contribute for the benefit individually received is by measuring the water he gets. The water meter is the instrument for this purpose, and the question is whether it is reasonable to require each consumer of water to pay for his individual meter, instead of all the taxpayers of the city paying for all the meters used. As is commonly the case, it may be in *Goodland* that some of the taxpayers of the city are not so located that they can, and they do not, in fact, use water from the public waterworks. If this be true, it seems very reasonable that they should be relieved of any contribution to pay for the meters of those who do use the water, and very reasonable that the consumers of water should pay for the meters of which they alone, as individuals, get the benefit."

§ 657. **Connections with premises included in rate charge.**—On the theory that the duty of furnishing its service at not to exceed a fixed rate includes the expense necessary completely to furnish service, the courts have held that in the absence of any express stipulation on the point, the expense of connecting the premises of the customer with the municipal public utility system must be borne by the company rather than by the customer, for as the court in the case of *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816, decided in 1908, said: "The contract nowhere provides that the consumer shall pay for such work, but the only basis for any charge to the consumer is found in the rate fixed by said provision. We think the failure to provide that the consumer should pay said rates, and also the cost of making the connection with his property, rather indicates that he was not to bear the cost of the latter. However, if said provision be taken as indicating by inference that the consumer was to bear such cost, the contract in other respects is

repugnant to giving it that construction. Primarily, the duty to furnish water to property owners on streets containing mains carried with it the duty to do and perform what was necessary to be done to place the company in position to furnish the property with water. It could not do this without connection to the property lines."

§ 658. **Service connections integral part of equipment.**²—The municipal public utility should install the necessary service connections at its own expense because it is a part of its equipment and because it only has the right to the use of the streets and the necessary control over its equipment to make the connections, for as the court in the case of *Colorado Tel. Co. v. Fields*, 15 N. Mex. 431, 110 Pac. 571, 30 L. R. A. (N. S.) 1088, decided in 1910, said: "Appellant seems to justify the charges for installation and removal on the ground that they are made in pursuance of a reasonable regulation on their part. We can not understand, however, that a regulation can under any circumstances be adopted by a public service corporation which will result in increasing a rental charge above what has been fixed by contract as a maximum charge. This was attempted in *Johnson v. State*, 113 Ind. 143, 15 N. E. 215, and it was held to be invalid. And the obligation to furnish telephone service at not to exceed a specified rental charge certainly must include the installation of a usable appliance connected with a system."

That connections to property to give service are necessary and integral parts of the water system and must be made by the company is clearly expressed in the case of *State v. Water Supply Co.*, 19 N. Mex. 36, 140 Pac. 1059, L. R. A. 1915A, 246, Ann. Cas. 1916E, 1290, where the court said: "Public utility companies, it is true, have a right to adopt and enforce reasonable rules and regulations for their security and convenience, and enforce compliance therewith by refusing or discontinuing the service. But the rules must be reasonable, just, lawful, and not discriminatory. If they be not so, their enforcement will be enjoined. If a privately owned water company, organized for profit, in which the citizens of a municipality do not participate, undertakes and agrees with the city that it will, at its own expense, carry the water to the lot line of its consumers, and there delivers the same, manifestly it can not escape this burden by adopting a rule which would impose the expense upon the con-

² This section (§ 537 of second edition) cited in *State v. Water Supply Co.*, 19 N. Mex. 36, 140 Pac. 1059, L. R. A. 1915A, 246, Ann. Cas. 1916E, 1290.

sumer. Such a rule would be unreasonable, unlawful, and unjust, and no consumer would be required to comply with it in order to secure the service. * * * From the excerpts * * * from the franchise, it will be seen that no specific provisions were made, imposing the duty of laying service pipes between the main and the curb, and within the franchise limits, upon either the company or the consumer. * * * All that can be said, from the wording of the franchise, is that it is silent on the question. But it does grant to the company the right to lay its pipes and mains 'through any and all of the streets, avenues, and alleys' in the said city, in order to enable it to supply water to the city and its consumers. The right continues and exists during the whole term of the franchise, and no further permit or license is necessary. Such right exists only in the company (Pond on Public Utilities, section 537), and the consumer, without special permission from the municipal authorities, would have no right to tear up the street and lay pipes therein. * * * There is undoubtedly sound reasoning back of the authorities on this question. Public service corporations are allowed to charge the public a certain sum for service. This sum is the compensation for the expense of the corporation in installing and operating the plant for the convenience of the public, and it is supposed to bear all the expenses which are not specifically charged against the public. If the legislature or the city council sees fit to provide that the property owner shall bear the expense of laying service pipes and making connections, then it is to be presumed that a lower rate will be fixed for service. If, as in the present case, no provision is made for laying service pipes and making connections, the rate allowed is presumed to be high enough to compensate the company for this expense. * * * Our conclusion, therefore, is that under the franchise, as thus construed, it was the duty of the water company to lay all necessary pipes, for supplying its customers with water, within the limits of its franchise, and this construction is fully supported by the adjudicated cases."

§ 659. **Connections at expense of customer under municipal ownership.**—Where the service is being rendered by the municipality, however, as in the case of the installation of the meter, the expense of installing and maintaining the service pipe or other equipment to connect the premises with the municipal public utility system may be imposed upon the customer as a reasonable regulation which has the effect of reducing the investment in the municipal public utility plant and of permitting

a lower rate to be charged for its system because of such reduction in the investment and in the expense of maintenance and operation, for as the court in *Cleveland v. Malden Water Works Co.*, 69 Wash. 541, 125 Pac. 769, decided in 1912, said: "If the company only lays its mains in the streets, it will as a matter of course, have less money invested than if it carries its pipes to the property line of each individual consumer, and will be compelled to charge less in the former case than in the latter; and, if there be no contract or statutory or municipal regulation in the way, a regulation requiring the property owner to defray the expense of piping and conducting the water from the main to his property line, and in addition to pay a reasonable monthly charge for the use of the water, would not seem unreasonable, provided the two charges combined be but a reasonable charge for the services rendered. But this case is controlled by the franchise ordinance, which requires the company to furnish water to users and consumers at certain fixed rates; and we are of opinion that it is not so furnished, within the meaning of the ordinance, unless it is delivered to the consumer at his property line."

§ 660. Liability for meter, etc., determined by provisions and construction of franchise.—The determination as to which party shall bear these expenses is largely a question of the construction of the ordinance or franchise provision, and because it is a matter of construction and the language used in different cases varies, the cases do not agree in requiring the company or the customer to bear the expense, each of whom derives special benefit, for as the court in the case of *State v. Gosnell*, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33, decided in 1903, said: "It is a matter of common knowledge that the use of meters has a double purpose, and that the dominant one, as regards the party furnishing the opportunity to take water, is to prevent useless consumption thereof. Secondary to that, and more for the benefit of the consumer than the party responsible for keeping up an adequate supply of water under proper pressure, is the measurement of the water. The consumer is burdened with the expense of providing a meter and keeping it in repair, but has the countervailing advantage, by the exercise of prudence in the use of the water, of paying only for the amount actually taken from the public supply, which, in most cases, by reasonable attention, can be made much less than what he would be required to pay by the schedule of rates where meters are not used. * * *

The whole scheme of the charter is that the consumer shall

bear all of the expense necessary to enable him to take water from the public supply. The service pipe, laid in the street from its connection with the water main to the curb stop, under the scheme of the charter, is required to be put in by the consumer or the owner of the property to be served."

§ 661. **Paving.**—That the franchise and contract rights determine the liability to pave between tracks imposed on street railways is well expressed in the case of *Boisot v. Amarillo St. R. Co.*, 244 Fed. 838,³ as follows: "Counsel further urges that the charter of the city of Amarillo, in effect at the time the franchise was granted to the street railway company, provided for an assessment of three-fourths of the cost of street paving against the abutting property on the front-foot plan, unless, in the opinion of the city commission, such rule should operate unjustly in particular cases; but that no such exception was made in the charter as to the assessment against the street railway company, which was arbitrarily required by the charter to pave the entire space between the rails and for two feet beyond. As this provision, however, was in the charter at the time the franchise was granted and accepted, the street railway company has now no cause for complaint. Not only was this provision in the city charter, but the street railway company expressly and specifically assumed this obligation by the very terms of its franchise and by the terms of the ordinance extending the life of the franchise. It did not have to accept the franchise, nor the subsequent extension, but, when it did so, the * * * provision of the city charter, and the paving provisions of the ordinances granting and extending the franchise, respectively, became valid and binding obligations. * * * Furthermore, it is well settled that a city, independent of such charter provisions, may stipulate in a franchise granted a street railway company a provision that the company shall pave the part of the street on which its tracks are located at its own expense, or pay for such pavement if done by the city, and such a provision, when a franchise is accepted, becomes a binding contract between the city and the railway company. * * * As the company is insolvent, the only parties really in interest are the city of Amarillo and the plaintiff. The latter acquired the bonds sued on subject to the paramount right of the city under its contract, and has no cause for complaint now that the city insists on a strict compliance with that contract. The insolvency of the defendant cor-

³ Affirmed in 249 Fed. 193.

poration does not release it from its obligations. If it made a bad contract, like an individual it must suffer the consequences."

That paving between the tracks of street railways may be required as a reasonable regulation even without an express undertaking to do so is decided in the federal case of *Durham Public Service Co. v. Durham*, North Carolina, 261 U. S. 149, 67 L. ed. 580, 43 Sup. Ct. 290: "The court below held that while this contract imposes no liability for paving, neither does it grant exemption therefrom. And we agree with their conclusion. Such exemptions must plainly appear. The general rule is that doubts as to provisions in respect of them must be resolved in favor of the municipality or state. *Cleveland Electric R. Co. v. Cleveland*, 204 U. S. 116, 130, 51 L. ed. 399, 405, 27 Sup. Ct. 202.

* * * The power of the legislature to make reasonable classifications and to impose a different burden upon the several classes can not be denied. There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks. The facts and circumstances disclosed by the present record are not sufficient to justify us in overruling the judgment of the state court, which held that the assessment was not the result of arbitrary or wholly unreasonable legislative action."

Under a franchise agreement to make necessary repairs in paving, a public utility is not precluded from the right to make the repairs itself and to be heard as to its liability to pave under a general policy of reconstruction of the street or highway which was undertaken in connection with the building of the Lincoln Highway so as to make it conform to the specifications of that highway, for as the court said in the case of *Irwin v. Irwin-Herminie Trac. Co.*, 301 Pa. 456, 152 Atl. 544: "Whether or not the avenue needed to be repaired was, in the absence of bad faith or something akin thereto, a matter within the discretion of the borough authorities. If they decided it did, defendant was bound, upon proper notification, to do the work itself or pay for it when done by the borough. * * * The agreement of the state and the borough to reconstruct and improve the avenue, so as to make it a part of, and similar to, the balance of the Lincoln Highway, raises no presumption of a need of repairs. Rather it suggests that they wished this great national road to be as complete and satisfactory a piece of work within the borough as it was elsewhere. * * * So far as appears, this was not done by direction of the borough council, but resulted from the engineer following his usual practice in such cases. In any event, it could not operate, as between the borough and defend-

ant, to determine that the work done was a repair or a reconstruction required because of needed repairs, or to waive defendant's right to have an opportunity, after notice, to do the work itself. The judgment of the court below is reversed, and judgment is here entered for defendant non obstante veredicto."

§ 662. **Double tracks.**—That public necessity and convenience may require a street railway to double its tracks as a reasonable regulation or requirement is the effect of the decision in *Phoenix R. Co. v. Geary*, 209 Fed. 694⁴: "All these people are dependent upon this single-track railway from the Capitol to Seventh Avenue in the direction of the business portion of the city of Phoenix. From Seventh Avenue eastward to the business portion of the city the track is a double track. On Washington Street between Tenth and Twelfth Avenues is located the public library and its park, frequented by the people of Phoenix. In the vicinity of the state Capitol there is an estimated population of from 1,200 to 1,500. The city of Phoenix as a whole is estimated to have a population of 25,000. For these people employed at the Capitol and living in that neighborhood, a reasonably quick service is required to and from the business portion of Phoenix. The affidavits before us set forth that there are delays in the transit of the cars over the single track of the railway, by reason of the fact that there is but a single turnout for this track between Seventh Avenue and Seventeenth Avenue; that a car going either east or west arriving at the turnout between Twelfth and Thirteenth Avenues ahead of a car going in the opposite direction must wait until the other car arrives at the turnout. It appears to the court from the evidence that this is a real, substantial inconvenience to the public residing in and frequenting that part of the city of Phoenix in and around the Capitol and the public library, and we believe it to be the duty of the complainant upon the showing made upon this motion to comply with the order of the corporation commission and double-track this line from Seventh Avenue to Seventeenth Avenue, so that the inconvenience of delays may be avoided. It appears that the cost of the double trackage will only amount to about \$13,000; that the value of the company's street railway property in Phoenix is something like \$500,000. We think it would be no great hardship upon the complainant to make this improvement. In a growing prosperous city like Phoenix, where the population is steadily on the increase, the complainant might very properly

⁴ Affirmed in 239 U. S. 277, 60 L. ed. 287, 36 Sup. Ct. 45.

keep well up and abreast of the actual requirements of the population."

That sidings and connection tracks are reasonably necessary to a street railway system is clearly indicated in the current case of *Union R. Co. v. New York*, 238 N. Y. 289, 144 N. E. 585, where the court said: "The theory upon which this complaint is brought is that a 'franchise to operate a railroad in the streets of a city is a franchise to operate it with sidings and connections reasonably necessary to the enjoyment of the grant. The municipal authorities consent, by implication, to the incident, in consenting to the principal.' * * * These cases are authority for the rule that what is reasonably necessary for the exercise of a public franchise is included in the franchise. * * * The right to maintain sidings and switches 'reasonably necessary' for the enjoyment of the franchise granted, during the entire life of the franchise, is clearly implied in the franchise whether the need for such sidings and switches is due to the original conditions or to changed conditions."

§ 663. **Special assessment of abutting property—Unearned increment.**—Some of the courts have permitted the expense of installing the necessary equipment of municipal public utilities to be placed upon the abutting property owner as a special tax for the increased value thereby given the land. Indeed, the doctrine known as the unearned increment theory of taxation, whereby land is required to repay in part at least the benefits received by it because of such improvements, has been logically and forcefully applied, for as the court in the case of *Gleason v. Waukesha County*, 103 Wis. 225, 79 N. W. 249, decided in 1899, said: "It is generally considered that property fronting on a street is increased in value by the laying of water, gas and sewer pipes, at least to the extent of the actual cost thereof, and municipal regulations are largely based on that theory, and are universally sustained by the courts so far as the burden imposed upon abutting property does not substantially exceed the benefits thereto. Such improvements, and the incidental duties in regard to them, public and private, are classed with sidewalks and pavements. The law is too well settled on this subject to warrant any extended discussion of it here."

§ 664. **Municipality obliged to preserve streets for travel.**—The nature of the tenure of the municipality in its streets and of its duty to maintain them free of obstructions for transportation and communication of the public is well stated by the

court in the case of *McIllhinney v. Trenton*, 148 Mich. 380, 111 N. W. 1083, 10 L. R. A. (N. S.) 623, 118 Am. St. 583, decided in 1907, as follows: "Municipal corporations, notwithstanding their broad and comprehensive powers, have no right, unless authorized by the legislature, to alienate their streets or devote them to the uses inconsistent with the rights of the general public and the abutting landowners. * * * The municipality holds the streets and power to regulate and control them in trust for the public, and can not put them to any use inconsistent with street purposes. Thus cities have no right to use their streets for the erection of municipal buildings or works, and it has been held that placing of a standpipe in a public street, the fee of which was in the municipality, was an unlawful use of the street."

In preserving the streets for general travel and communication, free of obstruction, a licensee, in order to operate street cars or motor buses for hire, is subject to constant supervision, as is clearly stated in the case of *Burgess v. Brockton*, 235 Mass. 95, 126 N. E. 456: "Regulation of the operation of vehicles for the conveyance of passengers and the requirement of a license for their use is a lawful subject for regulation by statute or by municipal ordinance. All this was decided in *Commonwealth v. Slocum*, 230 Mass. 180, 190, 119 N. E. 687, and cases there collected. *Commonwealth v. Theberge*, 231 Mass. 386, 121 N. E. 30. It now is too well settled for discussion that such limitations of the use of the highways come within the valid exercise of the police power. * * * The grounds upon which the aldermen acted afford illustration that the ordinance in its operation may be thought to be for the public interests. Private property invested in the street railway has been in a sense devoted to a public use. It can not be withdrawn at the pleasure of the investors. *White Co. v. Commonwealth*, 218 Mass. 558, 580, 106 N. E. 310, Ann. Cas. 1916C, 214; *Id.*, 246 U. S. 147, 157, 38 Sup. Ct. 295, 62 L. ed. 632. It can not be converted to other uses without great waste. Its owners can not be required in general to operate the road at a loss. *Donham v. Public Service Commission*, 232 Mass. 309, 316, 317, 122 N. E. 397. The petitioners have been licensed to transport passengers for hire. Their investment is not by its nature so irrevocably devoted to that service as is that of the street railway. It is obvious that the situation presents a conflict of interest, where the preponderating convenience of the public to be determined by some impartial tribunal ought to govern. That is the design of the ordinance.

The purpose of the aldermen in taking action was in conformity to that design. The petitioners have no absolute right to conduct the business of transporting passengers over the public highways. The circumstance that investments have been made in reliance upon the continuance of licenses affords the petitioners no superior standing. They are no better off than those who have paid a heavy license fee in the hope of a continuance of the privilege, and who are held to take their chances in that particular. *McGinnis v. Medway*, 176 Mass. 67, 57 N. E. 210; *Taber v. New Bedford*, 177 Mass. 197, 58 N. E. 640; *Brown v. Nahant*, 213 Mass. 271, 100 N. E. 550. Street railways in this commonwealth hold their locations in public ways under a tenure no more secure than a privilege or permit subject to revocation."

The nature and extent of the control of its streets which the city may exercise is well stated in the case of *Cutrona v. Wilmington*, 14 Del. Ch. 208, 124 Atl. 658⁵: "No man has the right to use the public streets as a place wherein to carry on his private business. * * * This complainant in the operation of his buses was engaged in using the streets of the city for the prosecution of a private business conducted thereon. So far as I have been able to discover the authorities are overwhelming to the effect that he has no inherent, no constitutional, right to carry on such a business. *Houston v. Des Moines*, 176 Iowa 455, 156 N. W. 883; *Greene v. San Antonio (Tex.)*, 178 S. W. 6; *Schoenfeld v. City of Seattle (D. C.)*, 265 Fed. 726; *Cummins et al. v. Jones*, 79 Ore. 276, 155 Pac. 171; *Frick v. City of Gary (Ind.)*, 135 N. E. 346; *Dent v. Oregon City*, 106 Ore. 122, 211 Pac. 909; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840; *Ex parte Parr*, 82 Tex. Cr. 525, 200 S. W. 404; *Harris v. Atlantic City*, 73 N. J. L. 251, 62 Atl. 995. * * * Thus far we have arrived at the conclusion that the city of Wilmington, by virtue of its power generally to regulate the use of its streets and to exercise entire jurisdiction and control over the same, has the power to regulate or even prohibit the use of the streets by operators of motor buses."

That the city's control over its streets covers their use by jitneys or other motor vehicles operating for hire is forcibly expressed in the case of *Schoenfeld v. Seattle, Washington*, 265 Fed. 726: "No right was acquired by the plaintiff by reason of the establishment of routes, termini, and the operation of 'jitney buses' over such routes; nor did any privilege accrue by

⁵ Affirmed in 14 Del. Ch. 434, 127 Atl. 421.

reason of the fact that he invested money in 'jitney buses,' nor is there force in the contention of the plaintiff that the issuance of a vehicle license for permission to operate a 'vehicle for hire' confers upon the plaintiff the right to operate such 'jitney bus' in violation of the ordinances of the city. * * * The plaintiff purposes to utilize the public streets of the city for a special purpose and private gain, a right not common to all. As to such the Washington court in *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18, supra, said, 'The power of the city as to such users of the streets is entirely plenary.' * * * The control of the streets in the city is exclusive; its power is plenary. The plaintiff has no vested right to the use of the streets for the carrying on of a private business as a common carrier, and the city has the power to regulate the operation of 'jitney buses' over the streets. The ordinance is within the police power of the city and is presumed to be valid, unless no state of facts could exist to warrant its passage."

§ 665. **Police power to regulate use of streets.**—The extent of the police power as authority for the municipality, in changing the grade or otherwise improving its streets in the interest of the public, to require municipal public utilities to remove or relocate their equipment at their own expense is indicated in the decision of *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 14 S. E. 665, decided in 1892, where the court said: "Thus, in express terms, the legislature conferred upon the corporate authorities of the city of Roanoke the most ample powers to grade and otherwise improve its streets, from time to time, as in its judgment and discretion was required for the safety and convenience of the public. The powers thus delegated are continuing and inalienable. It is therefore undeniable that, though a city may have agreed for a valuable consideration to allow a company to lay gas or water pipes in its streets, yet if, in the exercise of its authority to lower the grade of and to remove obstructions from its streets, the pipes should become exposed, so as to obstruct the public in the safe and convenient passage along them, the municipal authorities may of right either require such company to remove, or they, by their servants, may remove them as obstructions and nuisances."

While a municipality, acting under its police power, may require the removal of wires and cables and their replacement underground in order to permit of the construction of its rapid transit system, the expense of such removal must be borne by the municipality, where it was done for its benefit and at its

request and not at the expense of the public utility to which the wires belong, because their location did not constitute an unauthorized structure which it was necessary to remove for that reason. This principle and the reasons on which it is based are established and discussed as follows in the case of New York, New York v. Davis, 7 Fed. (2d) 566, where the court spoke in part as follows: "Also there is no doubt that in cities like New York the police power could authorize a requirement that its electric cables and wires, at points where the railroad crosses a street or highway, should be placed underground. Neither do we doubt the power of the state to delegate to a municipality the right to exercise the police power within the municipal limits. While the state of New York had delegated certain of its police power to the city of New York, that municipality could not deprive the plaintiff of its franchise right to operate its railroad within the city, or prevent it from using electricity as a motive power therein. * * * But the fact remains that a public corporation, like a private individual, may be liable on a quantum meruit if, having the power to make a contract, but having made none, it has nevertheless enjoyed the benefit of work performed or materials furnished to it, when no statute forbids or deprives it of the power to contract therefor. * * * Neither is it denied that this work was in all respects performed in a manner satisfactory to the public service commission. Neither is it seriously denied that the reasonable value of the labor and materials furnished in its performance of the work amounted to the sum demanded by the plaintiff, and which was awarded to it in the court below. Upon such a state of facts, we have no doubt that the plaintiff is entitled to the judgment which has been entered in its favor in the court below. * * * A quasi-contractual obligation is imposed by law for the purpose of bringing about justice, without regard to the intention of the parties. * * * The cases show that, when services are rendered or materials are furnished to a municipal corporation, which are necessities, and which the city has accepted and had the benefit of, it is liable on quantum meruit for the reasonable value of such services or materials, even though there is no valid contract between the parties. * * * It is admitted that the rapid transit railway could not have been constructed without the relocation of the cables. It is sought to escape from the effect of this admission by saying that this relocation would not have been necessary if the cables had been originally placed in a proper position. We are told that it was no more necessary for

the city, at its own expense, to relocate the feeder cables than it would have been to remove or compel the removal of any unauthorized structure in the street. One of the difficulties with this argument is that its proceeds upon the theory that the plaintiff had no right originally to construct its cables along the line of road in the manner it did, but acted unlawfully and without authority. As we have already decided that question adversely to the city, the contention must fail that the relocation of the cables was no more a 'necessary' expense for the city to incur than would be the expense of the removal of any unauthorized structure from the street. The premise being unsound, it does not support the conclusion. * * * We have no doubt that, under the authority conferred to construct the Rapid Transit line, authority existed to contract with the New Haven Road for the relocation of its feed wires; such relocation being a 'necessary' step in the successful prosecution of the work. * * * We do not think it can be seriously contended that the city was not benefited by the services rendered in the performance of this work. The public service commission admits that the relocation of the wires was necessary to permit the construction and operation of the Municipal Rapid Transit Railroad, which the commission was at the time engaged in building for the city, and for the cost of which relocation the commission had agreed that the city should pay. That the city was benefited by what was done is so apparent that it is unnecessary to say more concerning it. The work was done upon the urgent request of the city's agent, the public service commission, and the benefits resulting from it the city accepted and retained."

A municipal ordinance, requiring a street railway company to demolish a viaduct and construct grade crossings in its place, will be sustained under the police power, where it is shown that the viaduct is unsafe and in bad repair, and that the proposed change or improvement is not an unreasonable requirement of the street railway company in the interest of safety and for the improved and enlarged capacity which the improvement would afford the company in rendering its service. This principle is established and discussed as follows in the case of *New Orleans Public Service v. New Orleans, Louisiana*, 281 U. S. 682, 74 L. ed. 1115, 50 Sup. Ct. 449, where the court said: "The question presented by this appeal is whether an ordinance of the city of New Orleans requiring the demolition of a viaduct and construction of grade crossings to take its place violates the contract clause of the federal Constitution or the due process clause of the Fourteenth

Amendment. * * * Ordinance 6445 merely authorized the street railway company so to use the streets. No element of coercion was involved. The opinion of the Supreme Court shows that one of the roadways has been narrowed by the city's construction of a sidewalk and, granting that the track is not presently inadequate, indicates that additional capacity for service at this intersection is likely to be needed. And, upon sufficient evidence, the court found that the viaduct is unsafe and that extensive repairs are required to put it in proper condition. The value of the viaduct to be removed, the large expenditure involved for construction of the crossings in its place, and the dangers incident to their use constitute the sole basis of fact on which the ordinance is assailed. It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law. * * * The sacrifice of the old structure and the cost of the new crossings involve a large amount of money. But the evidence fails to show that, having regard to the circumstances, it is so large that the regulation must be held to pass the limits of reasonable judgment and amount to an infringement of the right of ownership. While the elimination of grade crossings is desirable in the interest of safety, there are other means that reasonably may be employed to safeguard against collisions at intersections of public streets and railroad tracks. Presumably the city will make and enforce appropriate regulations at this crossing. Appellant has failed to establish facts sufficient to require a finding that under conditions existing there it is not reasonably possible so to do. And it has not shown that the ordinance is so unreasonable that it transgresses constitutional limitations."

§ 666. **Party line telephones may be prohibited.**—That a condition of the franchise prohibiting party line telephone service is valid, and a reasonable regulation, is indicated by the case of *Louisville v. Louisville Home Tel. Co.*, 149 Ky. 234, 148 S. W. 13, Ann. Cas. 1914A, 1240, decided in 1912, where the court said: "In the instant case the language of the ordinance, under which appellee acquired its franchise, expressly declares in plain, unambiguous terms that 'there shall be no party lines constructed or maintained by the owner or company operating such telephone system or plant.' * * * The condition is therefore a part of its contract with the city; and if the city insists upon its compliance with that condition appellee can be compelled by

the courts to do so, even if the result should be the loss to it of the profits it has been accustomed to realize from its business."

§ 667. **Unreasonable to require service for all.**—That an ordinance requiring every municipal public utility to furnish electrical service to any citizen within the city on demand, regardless of his location, is unreasonable, is the effect of the decision in *Minneapolis General Electric Co. v. Minneapolis*, Minnesota, 194 Fed. 215, decided in 1911, for as the court said: "There is nothing in that section of the ordinance or in any other part of the ordinance, which limits the operation of the first section to those parts of the city to which the conduits or lines of the company are now extended. It appears that there are large districts in the city where these conduits do not reach, and that they are sparsely populated districts. If that section is to be given its plain meaning, it indicates that any person in the extreme borders of the city can make a demand upon the company for installation of its service, although he may be miles from any conduit or line. It would then be its duty to obtain an order from the city council to extend its lines to that section, and the company would be compelled to comply with this demand under the penalty provided by the ordinance."

In distinguishing street railway systems from other public utilities and holding they could not be required to extend their services without special street franchise rights for the new territory, the court said in *Hollywood Chamber of Commerce v. Railroad Commission*, 192 Cal. 307, 219 Pac. 983, 30 A. L. R. 68, P. U. R. 1924B, 503: "To us it seems beyond question that the extent of the obligation of the Los Angeles Railway Corporation to serve the public although not necessarily limited by the street car lines now in operation, is limited and defined by the franchises under which it operates. * * * The argument of the railroad commission seems to be predicated upon the erroneous assumption that a street railway company's public duty is analogous to the duties of a water, gas, electric power, or telephone company, which are required to expand their facilities to meet the demands of a growing community. * * * A street railroad company must obtain from the municipality a separate franchise covering each of its lines, whereas these other utilities are given franchises to supply the inhabitants of a particular community with water, gas, electricity, or telephone service. * * * But where, as in the present case, the company does not hold franchises allowing it to voluntarily construct these extensions, there is no justification for saying that the company has im-

pliedly undertaken to extend its lines whenever it should become necessary."

Unreasonable extensions of plants into unprofitable territory, which can not support such service, will not be required because it would be confiscatory in effect, as is decided in *Public Service Comm. v. Brooklyn &c. Water Co.*, 122 Md. 612, 90 Atl. 89, where the court said: "We know of no case holding that a public service corporation may be required to extend its plant into territory that it has not attempted to serve when the probable revenues to be derived from such service are not sufficient to pay the interest on the cost of the extension and the maintenance of the service, and where such corporation, by reason of its inability to earn dividends or operating expenses, has not the money to pay for said extension, and is unable to sell its bonds for that purpose. Such a requirement would not only endanger the service the appellee is now rendering in Curtis Bay, but would result in disaster to the company and ultimate confiscation of its property."

To the same effect in holding that the city need not supply scattered and distant consumers with water, the court, in the case of *Marr v. Glendale*, 40 Cal. App. 748, 181 Pac. 671, P. U. R. 1919E, 679, said: "From the fact that the municipality may engage in the business of supplying its inhabitants with water, it does not follow that every property owner or taxpayer, however remote his land may be situated from the distributing system, can by mandate compel such extension of the system as will make available to him that supply. It would be most unreasonable to hold that a municipality must establish an expensive system of distributing lines to reach isolated inhabitants or to supply one or two persons living in places remote from well-settled districts; and more particularly is this true where the person asking for such service already has at his door water in sufficient quantity and of reasonably good quality. In our opinion, the appellant failed to show facts which would justify the court in extending to her the relief demanded in her complaint."

While a public utility may be required to extend its service to meet a reasonable demand for it, extensions will not be required where the cost of making them and maintaining the service would be out of proportion to the prospective revenue from the territory purposed to be served, for as the court said in the case of *Ladner v. Mississippi Public Utilities Co.*, 158 Miss. 678, 131 So. 78: "The duty of such a water company to extend the service to all applicants who reside within the municipality and are will-

ing to comply with its regulations is not an absolute one, but it is charged with the duty of furnishing water where there is a reasonable demand for it, and a reasonable extension of the service can be made to meet the demand, considering the cost of the extension and the maintenance of the service, the present and prospective number of subscribers or customers, the present development and the prospective growth and development of the locality to be served, and the present and prospective revenue to be obtained from furnishing water in the territory to be served by such extension. * * * Upon the extensive proof offered by the respective parties bearing upon the many elements and factors necessary to be considered in determining the reasonableness of the proposed extension, the court below denied the mandatory injunction prayed for, and we are unable to say that it was manifestly wrong in so doing."

Where a public service commission orders an extension of service in a new territory and there is evidence that the cost of the extension will be carried by the revenue to be received from the consumption of service in the new territory, the order will be sustained on this account and for the further reason that courts hesitate to substitute their judgment for that of the commission in such matters, as is indicated in the case of *People v. Public Service Comm. of New York*, 269 U. S. 244, 70 L. ed. 255, 46 Sup. Ct. 83: "Taken together they show that the order has not been complied with; that a part of the extensions ordered has been laid, but that the company has not planned, and does not intend, presently to lay the mains necessary to furnish gas to all the communities directed to be served. The company is unwilling fully to comply with the order and maintains that it is invalid. If the judgment of the state court is not reversed, summary proceedings to compel the company to obey the order may be brought by the commission in the state court. * * * The company has long had the privilege of laying gas mains in the streets and other public ways of the town of Jamaica (now the fourth ward of the borough of Queens) to distribute gas for street lighting and other purposes. It does not appear that any other utility is authorized to furnish gas there, and it is to be assumed that these communities are dependent upon this company for service. When reasonably required, the company is in duty bound to furnish gas to inhabitants of the territory covered by its franchise. *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 528, 533, 47 N. E. 787. And the commission is empowered by statute to require reasonable extensions of

the mains and service. Public Service Commission Law, *supra*, section 66 (2). In the territory already served by the company there are 150 consumers per mile of main. The sections for which service is ordered are residential communities. They have had water and electric service for many years. The houses already there, and those being built, are of a kind to indicate that, if brought within reach, gas will be used by the large part of the inhabitants. There are good prospects of growth in the immediate future. The facts justify reasonable anticipation of a substantial and increasing demand for gas in the territory to be reached by the extensions. * * * The court will not substitute its own judgment as to what extensions are reasonable for the determination of the commission. *New York ex rel. New York & Q. Gas Co. v. McCall*, 245 U. S. 345, 62 L. ed. 337, 340, P. U. R. 1918A, 792, 38 Sup. Ct. 122. But it will consider the advantages to result to the public from the extensions ordered; it will also consider the investment required to make the necessary additions to property, the cost of furnishing gas in the added territory, the effect of the new service upon the company's income as a whole; and, if it appears that the power to regulate was so used as to pass beyond the exercise of reasonable judgment and to amount to an infringement of the right of ownership, the order will be held invalid as repugnant to the due process clause. Under the guise of regulation, the state may not require the company to make large expenditures for the extension of its mains and service into new territory when the necessary result will be to compel the company to use its property for the public convenience without just compensation. * * * Here, the rate is not involved. The order directs the extension; it does not deal with compensation. The commission reasonably might assume that the company will take appropriate steps to save its property from confiscation. *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 174, 177, 66 L. ed. 538, 547, 548, 42 Sup. Ct. 264. Indeed, it is said that the prescribed maximum already has been adjudged too low and confiscatory. The company's voluntary extension of mains to increase sales greatly impairs the weight of the contention that, because the cost of service exceeds the rate, the order is arbitrary. There is nothing to show that just compensation for the service ordered may not be had, or that compliance with the order will necessarily so reduce the company's income from its operations as a whole as to be in effect a confiscation of its property, or that, at rates not unreasonable or prohibitive, consumption of gas in the communities

directed to be served will not be sufficient to yield a just return on the necessary additions. The company's contention can not be sustained."

Reasonable requirements for the extension of service covering new territory may be made by the public service commission, and the matter of the earnings from such business is an item which should be considered in determining the reasonableness of the order for the extension of the service, as is indicated in the case of Philadelphia Rural Transit Co. v. Public Service Comm. (Pa.), 158 Atl. 589, where the court said: "If a portion of the territory served is not profitable, but the entire service produces a fair return on the investment, the utility may still be required to serve the unprofitable portion, if the rendering of such service does not result in an unreasonable burden on its other service. * * * We are not persuaded that the order made by the commission in solving the administrative question before it is unreasonable, arbitrary, or capricious. * * * But here appellant obtained by its charter not only the right to operate over a certain route, but also to extend that route and to operate other routes in certain specified territory with the approval of the public service commission. We do not doubt that under the terms of such a charter the commission has the power to compel a public service company to extend its service into any part of the territory in which it is authorized to do business, and that an application by the company to the commission is not a condition precedent to an order requiring such an extension. The right to apply to the commission for the privilege of extending service in the territory mentioned in the charter carries with it an obligation to make extensions which the commission determines to be reasonably necessary for the accommodation of the public."

§ 668. Collections.—An extra charge for collections from delinquent subscribers was upheld in the case of Owosso v. Union Tel. Co., 185 Mich. 349, 151 N. W. 1029, where the court said: "It is true that complainant's bill charges defendant sent statements of account to its subscribers which, as made out, imposed a rate plainly in excess of that fixed by ordinance and previously charged, which, but for the explanatory note appended, would raise a more serious question. Read, however, with the explanation appended, they became innocuous and the extra charge disappeared as to all except delinquents, and we are not advised that there were any such. Defendant's counsel assert that the extra charge of fifty cents was intended for and amounted to

notice of a rule, imposing a penalty on those in default, and was no intimation of a purpose to depart, otherwise, from the regular rates previously charged. Clearly such is the meaning of the communication taken as a whole."

To prevent a sudden shutting off of the water supply because of a disputed account is sufficient ground for equitable relief and an injunction will issue on such facts, as was clearly decided in *Carter v. Suburban Water Co.*, 131 Md. 91, 101 Atl. 771, L. R. A. 1918A, 764: "The courts appear to be quite uniform in holding that a water company can not arbitrarily shut off the consumers' supply when the amount claimed is a matter of just dispute.

* * * That an injunction is the proper remedy to prevent the shutting off of the water in cases where the consumer denies in good faith either his liability or the amount of the charge appears to be well established by the authorities. *Edwards v. Milledgeville Water Co.*, 116 Ga. 201, 42 S. E. 417; *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785; *American Conduit Co. v. Kensington Water Co.*, 234 Pa. 208, 83 Atl. 70. The occupants of these houses must have water daily and hourly. It is a prime necessity to comfort and health, and to suddenly shut off the water in order to coerce the owner to pay an unjust or a disputed bill would be not only a violation of his legal rights, but would subject him to serious injury, and such injury as the owner would likely sustain before he could be compensated in an action at law even against a solvent corporation is sufficient to furnish the equity for an application for an injunction."

That regulations for payment of telephone accounts in advance will be upheld as reasonable is decided in the case of *Southwestern Tel. & T. Co. v. Danaher*, 238 U. S. 482, 59 L. ed. 1419, 35 Sup. Ct. 886, L. R. A. 1916A, 1208, where the court said: "Like regulations often had been pronounced reasonable and valid in other jurisdictions and while some differences of opinion upon the subject were disclosed in reported decisions, the weight of authority was on that side. It was also strongly supported in reason, for not only are telephone rates fixed and regulated in the expectation that they will be paid, but the company's ability properly to serve the public largely depends upon their prompt payment. They usually are only a few dollars per month, and the expense incident to collecting them by legal process would be almost prohibitive. It uniformly is held that a regulation requiring payment in advance or a fair deposit to secure payment is reasonable, and this is recognized in the brief for the plaintiff where it is said that to protect themselves against loss telephone

companies 'can demand payment in advance.' If they may do this, it is difficult to perceive why the more lenient regulation in question was not reasonable. If it be assumed that the state legislature could have declared such a regulation unreasonable, the fact remains that it did not do so, but left the matter where the company was well justified in regarding the regulation as reasonable and in acting on that belief. And if it be assumed that the company should have known that the Supreme Court of the state, in the exercise of its judicial power, might hold the regulation unreasonable, even though the prevailing view elsewhere was otherwise, the question remains whether, in the circumstances, penalties aggregating \$6,300 could be imposed without departing from the fundamental principles of justice embraced in the recognized conception of due process of law. In our opinion the question must be answered in the negative. There was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct. Some regulations establishing a mode of inducing prompt payment of the monthly rentals was necessary. It is not as if the company had been free to act or not, as it chose. It was engaged in a public service which could not be neglected. The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions. In these circumstances to inflict upon the company penalties aggregating \$6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law."

Where the expense of collecting delinquent accounts would be prohibitive if made by legal proceedings, the public utility may discontinue service, for the courts will sustain the action of the company in enforcing prompt payments in the interest of efficient service and fair treatment to all customers, as is indicated in the case of *Central Louisiana Power Co. v. Thomas*, 145 Miss. 352, 110 So. 673, P. U. R. 1927B, 654, where the court said: "Under appellant's rules, its tolls for current furnished are payable monthly on or before the fifteenth of each month for the month ending on the twentieth day of the month previous, and its rules also provide that if such charges are not paid by that time, appellant shall have the right to cut off the electric current of its delinquent patrons. Such rules are reasonable and

necessary to properly protect and carry on the business appellant is engaged in. They are necessary to protect appellant's plant and keep up its efficiency. The enforcement of such rules is necessary to insure a reasonable revenue from the character of business appellant is engaged in. Appellant can maintain an efficient service only through prompt payment of its monthly tolls, and, because of that fact, it should have the right to resort to the summary remedy of denying service for nonpayment of tolls. Appellant can not be denied the benefit of such rules because a patron presents a counterclaim for unliquidated damages. Appellant can not be required to stop and adjudicate such claims. It has the right to enforce payment of its current dues and tolls by this summary remedy. * * * The efficiency of the service depends upon the prompt payment of the monthly tolls and charges. The expenses incident to their collection by legal proceedings might be prohibitive. *Rushville Telephone Co. v. Irwin*, 27 Ind. App. 62, 59 N. E. 327; *Goodwin v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Buffalo Telephone Co. v. Turner*, 82 Nebr. 841, 118 N. W. 1064, 19 L. R. A. (N. S.) 693, 130 Am. St. 699; *Southwestern Telephone Co. v. Danaher*, 238 U. S. 489, 35 Sup. Ct. 886, 59 L. ed. 1419."

While the public utility may refuse to continue to render service until payment is made for that which has been received, it may not do so unless the correct amount was charged for the service; and in the event that service is discontinued under such conditions, the public utility is liable for the damages which result from that act, for as the court said in the case of *Kentucky Utilities Co. v. Warren Ellison Cafe*, 231 Ky. 558, 21 S. W. (2d) 976: "There was no wilful or negligent failure on the part of appellee to pay the bill. It was not paid because the amount was in good faith disputed. * * * It did not pay in full and its current was discontinued, not only that passing through the light meter but the other meter as well. The bills had been paid for the service supplied through the other meter. * * * It is the law in the case of a public service company that it may make and enforce a reasonable rule to refuse service, if after notice, a bill remains unpaid, but in such event it is liable in damages if the bill rendered is unjust or erroneous. If the bill rendered was just and correct and the consumer refused to pay, the cut-off rule may have been invoked. * * * If a public service company discontinues its service to a consumer, it passes judgment on its own case. Therefore it must know that its rules have been violated after a correct bill has been submitted before

it is justified in applying the cut-off rule. If it applies the rule without the right so to do and the customer is damaged thereby, the company is liable for damages naturally flowing from its act in discontinuing the service. These principles were restated in the case of *Louisville Tobacco Warehouse Co. v. Louisville Water Co.*, 162 Ky. 478, 172 S. W. 928. If the agent made such an agreement, recognizing that the bill was incorrect, appellant was without authority to invoke the cut-off rule, and if that be so, and damages resulted, caused directly by its wrongful act, it must be held responsible."

While prompt payment for service may be required as a condition of its continuance, even the municipality has not the power, in the absence of a special statutory provision to that effect, to require a prospective customer to pay for service furnished on the premises to a former customer on the theory that there is a lien for such service against the property or the proprietor, for as the court said in the case of *Carnaggio v. Greenwood*, 142 Miss. 885, 108 So. 141: "The contract with the original owners of the Elite Cafe was a contract between the city and those persons. No lien was established in favor of the city by furnishing electricity. There is nothing to show any agreement by the appellants to assume that indebtedness in the purchase of the business, nor does the law impose any obligation except in cases where the law or a contract creates a lien, and a party is only liable for the debts of another person when he contracts to become liable, unless a statute has imposed a condition upon the right to contract. In the case of a city furnishing the public electricity or water, it becomes a public service business, and must furnish those persons applying therefor this public service, and can not require a person applying to pay the debts of other persons who have used the service at the same place and have not paid the bills unless it has a contract by which it has secured a lien or right going with the property and binding it in the hands of the purchasers."

Extra charges for collections, as well as for additional service not covered by the franchise, are generally sustained and on the failure to pay these extra charges the same as those under the regular franchise rate, the company may discontinue the service, as is indicated in *Miami Water Co. v. Miami*, 101 Fla. 506, 134 So. 592, where the court said: "Having inspected the ordinance and the agreement affecting the respective rights of the parties, and finding that there is no contractual obligation upon the part of the water company to furnish this service without

charge, we must then determine whether or not the water company is under the law required to furnish such service free of charge because of its duty under its contract to furnish water in the city under the provisions of section three of the ordinance granting the original franchise. It appears to be well settled in a great majority of jurisdictions where this question has been presented that a water company which supplies the pressure and water for standpipes or automatic sprinkler systems for individuals or private corporations performs a service which is not included under its contract with municipal authorities to supply water for fire protection, and a water company supplying such stand-by service has the right to make a reasonable charge against the private owner therefor. * * * It is too well settled to be now seriously questioned that a water company has the legal right to cut off its connection with supply pipes leading to privately owned property upon the failure of the person, firm, or corporation, against whom reasonable charges for services are made, to pay such reasonable charges."

That the cutting off of water service without notice and with the knowledge of the probability of damages which would result from doing so may constitute wilful negligence and wantonness is a question of fact for the jury to decide as is indicated in the case of *Alabama Water Service Co. v. Johnson*, 223 Ala. 529, 137 So. 439: "Under the evidence of the plaintiff as to defendant's wilful act, after deliberation and preparation to that end by its authorized agents to act in the premises, the tendency of defendant's evidence that the pressure chart showed no cutting off of water, and the nominal verdict returned, rendered the submission of the wilful count without error. * * * That is, we can not say as a matter of law that it was not a wilful and wanton act in cutting off the water without notice and with a knowledge of the probability of damages. Had defendant admitted shutting off the water and stood on justification of the act by reason of facts beyond its control or making it necessary to cut off the water, the question of wantonness would have been eliminated."

A rule requiring a substantial deposit in addition to the ordinary one before providing service must be approved by the corporation commission before it can be enforced on the subscriber, for as the court said in the case of *Horton v. Interstate Tel. & T. Co.* (N. Car.), 163 S. E. 694: "The present action concerns an intrastate transaction. The facts disclose that the managers and superintendents of the company follow an established rule,"

etc. 'This rule has never been formally adopted at a meeting of the stockholders or board of directors of the company and has never been published,' etc. Nor does it appear that this rule has ever been given approval by the corporation commission, or indeed that it has ever been brought to the attention of the corporation commission. Plaintiff paid the usual deposit of nine and one-half dollars. This controversy involves the twenty-five dollar additional deposit. It may be that the exigencies of the telephone business are such as to require, under certain circumstances, if reasonable and not arbitrary or discriminatory, such a regulation, but as to that the corporation commission, under the law perhaps, would be the proper agency to determine that fact."

The fact that a consumer of utility service fails to pay for the same will not justify discontinuing the service to the same consumer under a separate contract and at a different location under the rule established in the case of *Southwestern Gas & Electric Co. v. Stanley* (Tex. Civ. App.), 45 S. W. (2d) 671: "The monthly bills were charged and kept separately. There is no provision in either of the contracts that unless both bills for the residence and the garage were timely paid both of the places would be cut off, or that default in the payment of the one bill would justify discontinuing electricity to both the garage and the residence. In no wise had the appellee failed or defaulted in the performance of his agreement to pay timely the monthly charges for electricity for his residence. * * * Consequently the non-payment of the garage bill would not legally justify cutting out the electricity for the residence."

Until a bill is rendered for service, the public utility is not justified in discontinuing the service and may become liable for the loss of patronage to the business of the consumer resulting from such action, as is indicated in the case of *Wink Gas Co. v. Huskey* (Tex. Civ. App.), 42 S. W. (2d) 819, where the court said: "The record shows that appellant discontinued furnishing gas to appellee, not because she had failed to pay for gas used by her through the 'outlaw' pipe, but for gas which their meter had erroneously registered as having been used by her in March. We are of the opinion that appellant was not authorized in shutting off appellee's gas because she had not paid for gas used by her, which was not included in the bill rendered to her. *Randolph v. St. Joseph Gas Co.* (Mo. App.), 250 S. W. 642. We can not agree with appellant's contention that it is not liable to appellee for damages resulting from loss of patronage to her busi-

ness, because the evidence fails to show a contractual relation between the parties in regard to furnishing gas for such business."

Where a company is furnishing a public utility service to the public generally, it is subject to public regulation and control and it may not cut off its service in order to force a collection of a collateral obligation, which is not connected with its service, for as the court said in the case of *Pennsylvania Chautauqua v. Public Service Comm. (Pa.)*, 160 Atl. 225: "A company which is in fact rendering service as a public utility can not escape regulation on the ground that it has no charter right to render such service. Counsel for appellant contend also that the service rendered by it is not public because water is furnished only to persons who have acquired title to lots within the Chautauqua grounds. * * * The distinguishing feature of a mutual company is that it serves at cost only its own members who have the control over its management. Appellant does not do this. It supplies water to all the inhabitants of the borough, whether they are stockholders of the corporation or not, at uniform rates. Its system is the only water supply of the inhabitants of the borough. It furnishes them with a prime necessity of life. In our view, the character and extent of the water service rendered make it public. Being a public one, it is subject to regulation under the statute. One who uses his property in supplying a municipality with water clothes such property with a public interest and subjects the business to regulation. * * * It follows that appellant's action in cutting off water service to enforce payment of a collateral obligation of one of its patrons was wholly unjustified. 'The service can not be cut off to force payment * * * of a collateral liability not connected with the particular service.' 20 C. J. 333. Our conclusion is that the report of the commission fully justifies the order made."

In the absence of any statutory provisions to that effect a public utility is not entitled to a lien on premises for service supplied to the premises, and it may not refuse to render service to a later owner or tenant of the premises because its service to a former one remains unpaid, for as the court said in the case of *Vanderbilt v. Hackensack Water Co. (N. J.)*, 160 Atl. 825: "It is stipulated by the parties that there is no statute rule or regulation in this state under which defendant is entitled to a lien on premises for arrears for water supplied. In that situation defendant may not refuse to supply water to a new owner or tenant of the premises unless defendant's charges in arrears

for water supplied to a previous owner or tenant are paid, and this court may grant relief against the consequences of such a refusal. *Dayton v. Quigley*, 29 N. J. Eq. 77; *Coe v. N. J. Midland R. Co.*, 30 N. J. Eq. 440; *McDowell v. Avon-by-the-Sea*, 71 N. J. Eq. 109, 63 Atl. 13; *Millville Improvement Co. v. Millville Water Co.*, 92 N. J. Eq. 480, 113 Atl. 516."

§ 669. **Municipality requiring conduits limited to reasonable necessity.**—The limitation of reasonableness placed on the right of the municipality to exercise its police power in the regulation of its municipal public utilities is well illustrated in the case of *Northwestern Tel. Exchange Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, decided in 1900, where the court refused to sustain the requirement of the municipality that all telephone wires be placed underground in conduits, for this was unnecessary and an unreasonable requirement in the sparsely settled suburban districts of the city. As the court expressed it: "The addition of ten times the area through which underground conduits must be constructed at an enormous additional expense, without necessity, is violative of the contract entered into between the city and the plaintiff in the ordinance under which the system was established. The requirements imposed by the later ordinance upon the company to build such conduits through ungraded streets in suburban parts of the city and in the open country, is clearly, upon its face, unreasonable, and the claim to exercise such right on the part of the common council of the city at their 'will and mere motion' can not be sustained in the reasonable exercise of the police power, or upon any theory that is consistent with the acquired and vested rights which the plaintiff enjoys under the constitution and the laws. * * * In a proper case, where the city exercises its power of control in the regulation of the use of the streets by the plaintiff, based upon necessity and the interests of the public, that power will be sustained. Beyond that limit it can not go. * * * A city has the right to enact reasonable ordinances, and to enforce them; but it is the conservator, not the autocrat, of the police power. * * * It is not to be doubted that the city council has the plenary power to extend the subsurface district wherever, in the exercise of a fair discretion, it decides that public interests require it to be done."

An interesting decision on the power of the city to require wires to be placed underground is furnished in the case of *New York v. Prendergast*, 202 App. Div. 308, 195 N. Y. S. 815, P. U. R. 1924A, 530: "The removal of the poles from the street and

placing the wires underground had no relation to the service of the companies to their patrons, nor to the rate of charge for such service. It was not an exercise of the regulatory power of the state over public service corporations. It was an exercise of the power and duty of the state as keeper of the highways to render them safe and convenient for the public use for which they were intended. * * * If there is doubt whether the power is given, the commission should not assume to act; but, if it seems appropriate that the commission should have the power, the legislature should be asked to give it. In my opinion, the subject matter of the proceeding instituted by the commission was not within its jurisdiction, and the order should be affirmed, with costs."

That the city may require service wires to be placed under ground is well expressed in the case of *Butte v. Montana Independent Tel. Co.*, 50 Mont. 574, 148 Pac. 384, as follows: "The ordinance in question defines the boundaries of the congested business district in Butte, requires all corporations or individuals maintaining wires within that district for the transmission of electricity for light, heat, power, telephone, telegraph, or other purposes, except trolley wires for street railways, to place such wires underground, and provides punishment for disobedience. These appeals challenge the validity of that ordinance. * * * Ordinance No. 1030 is a police regulation, and it is the general rule that, unless specifically restricted by the constitution, the legislature may delegate to municipal corporations the authority to exercise the police power through the instrumentality of reasonable rules and regulations. * * * In the absence of any constitutional restriction, the authority of the legislature to confer upon cities the power to prescribe and enforce reasonable police regulations for the telegraph and telephone business must be conceded."

§ 670. **Supervision.**—That the city may require the payment of a reasonable sum to cover its expense of care and supervision is clearly indicated in the case of *Columbus Citizens Tel. Co. v. Columbus*, 88 Ohio St. 466, 104 N. E. 534: "There is a statute which provides that gas, electric, and water companies may lay conductors for supplying gas, electricity, and water through the streets, lands, and squares of a city, with the consent of the municipal authorities, under such regulations as they may prescribe. Section 9320, General Code. And this court has held that the council of the city may require a gas company, to which it grants the right to lay its pipes and other appliances in the

streets and other public places, to pay annually to the city a reasonable sum to compensate for the city's necessary supervision after as well as during the construction of the system, and, when the company accepts the terms of the grant according to law, and occupies the streets under such grant, such acceptance becomes a valid contract between the parties for the annual payment of said sum; and also that a provision in the grant that said payments are 'for the benefit of the gas and light fund' does not render the ordinance invalid as a means to raise general revenue, said clause being subordinate to the principal obligation. *City of Columbus v. Columbus Gas Co.*, 76 Ohio St. 309, 81 N. E. 440. * * * By analogy, therefore, the stipulation for annual compensation in the contract in the case at bar is as reasonable and should be as valid as the stipulation in the ordinance in the case last cited. It is a reasonable exercise of the power of the municipal corporation to exercise care and control of its streets and public areas. * * * The debtor company accepted the grant, and acquiesced in its terms during three years, and has enjoyed all its privileges and emoluments. The company was free to promise the annual payment or refuse the grant. Certainly the demand for a debt thus voluntarily incurred as a recompense for a grant can with no propriety be called a tax in any sense. A tax is imposed by sovereign power; it creates an involuntary obligation."

That reasonable rentals for placing poles in its streets may be collected is the effect of the decision in the case of *Postal Telegraph-Cable Co. v. Richmond, Virginia*, 249 U. S. 252, 63 L. ed. 590, 39 Sup. Ct. 265: "The principle of these cases, and of many others cited in the opinions, is that, as against federal constitutional limitations of power, a state may lawfully impose a license tax, restricted, as it is in this case, to the right to do local business within its borders, where such tax does not burden, or discriminate against, interstate business, and where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce. Such a tax is not, as is argued, an inspection measure, limited in amount to the cost of issuing the license or supervising the business, but is an exercise of the police power of the state for revenue purposes, restricted to internal commerce, and therefore within the taxing power of the state. *Postal Telegraph-Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. 1094; *Williams v. Talladega*, 226 U. S. 404, 416, 57 L. ed. 275, 280,

33 Sup. Ct. 116; and *Western U. Teleg. Co. v. Alabama Bd. of Assessment* (*Western U. Teleg. Co. v. Seay*), 132 U. S. 472, 473, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. 161. * * * There remains to be considered the fee, as it is called in the ordinance imposing it, of two dollars for each pole maintained or used in the streets of the city of Richmond. This character of tax has also been the subject of definite decision by this court, and has been sustained where not clearly shown to be a direct burden upon interstate commerce or unreasonable in amount, having regard to the purpose for which it may lawfully be imposed. *St. Louis v. Western U. Teleg. Co.*, 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. 485; *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. 204; *Postal Telegraph Cable Co. v. Baltimore*, 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. 356; *Atlantic & P. Teleg. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. 817; *Western U. Teleg. Co. v. Richmond*, 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. 449."

An order of the state commission or department requiring the removal of telechronometers will be sustained where it appears that there was no abuse of the wide discretion of the state in the regulation of such matters, for as the court said in the case of *State v. Baker*, 164 Wash. 483, 2 Pac. (2d) 1099, P. U. R. 1931E, 482: "The contract and lease, pursuant to which telechronometers were installed in the Everett Exchange, bears date prior to the entry of the order of March, 1926 * * *. As this contract was entered into prior to the entry of the order of March, 1926, * * * it can not be contended that the contract was based upon that order, and by express terms it is stated that the contract was made subject to any order of the department requiring the removal of the telechronometers. It would seem that under no ordinary circumstances could the authority of the department be limited by such private contracts as the one just referred to, but, in any event, in view of the express terms of the lease, we are clearly of the opinion that respondent's contention that the department unlawfully interfered with contractual relations is not well founded. * * * The determination of such questions of fact should rest largely with the department. That is the tribunal provided by law for the determination of such matters as this which involve business, engineering, mechanical, social, and economic situations and conditions, and require expert knowledge, careful study, and investigation of engineering and mechanical problems which are important in determining questions involving the exercise by public utilities of

their normal functions. As has been often stated, courts are extremely reluctant to interfere with such regulatory bodies in the exercise of that discretion vested in them by law. * * * The order directed the discontinuance of the use of telechronometers and the removal of the instruments."

A public utility is permitted to engage in the business of selling equipment and appliances for the use of its service in order to stimulate such use and to increase the volume of its sales, as is indicated in the case of *Commonwealth v. Philadelphia Elec. Co.*, 300 Pa. 577, 151 Atl. 344, where the court said: "May a corporation, chartered for the purpose of supplying heat, light and power by electricity, sell, as an incident to its business, electrical appliances by means of which power is delivered to and utilized by its consumers? The court below answered in the affirmative and entered judgment for respondent; hence this appeal. The trial judge found as a fact that 'the primary object of respondent in merchandising electrical appliances is to stimulate in every proper way a demand for the use and consumption of electric current which in turn promotes the respondent's business generally by increasing the sale of such current,' and that the 'volume of respondent's business in the sale of electric refrigerators amounts to approximately only one per cent of its entire business.' In entering judgment for respondent, the trial judge properly concluded that the reasons which this court gave in support of its decision in *Malone v. Lancaster Gas L. & F. Co.*, 182 Pa. 309, 321, 322, 37 Atl. 932, 933, apply here. * * * It would be of no use to manufacture gas if there were no customers to buy, and hence the company may fairly supply, not only the gas itself, but, incidentally, such appliances and conveniences as will induce new customers to use gas, or old ones to use more. This is a legitimate mode of extending the company's business, in direct furtherance of its charter object."

A municipal ordinance, denying the right of a street railway company to operate one-man cars for the sake of its safety but at a very considerable expense to the company, which might result in rendering its rates confiscatory, was enjoined, pending at least a temporary trial of the plan of the company in the case of *Georgia Power Co. v. Atlanta, Georgia*, 52 Fed. (2d) 303, P. U. R. 1932A, 373, where the court said: "While it is possible, though stoutly denied by petitioner, that the putting of an extra man on the one-man cars might add somewhat to the safety of operation, speed up traffic to some extent, and effect in some measure the other advantages claimed by defendant from such operation;

nevertheless it is apparent from the evidence adduced at the hearing that there is no great emergency, that decided improvement in safety and traffic conditions under the two-men operation is problematical, that the feasibility of such operation without converting the one-man cars is doubtful, that any improvement in safety and traffic conditions which might result from the enforcement of the ordinance would be obtained at very great, if not confiscatory, cost to petitioner at a time when business and competitive conditions are causing an increasingly large decrease in gross revenues each year, that the reasonableness and validity of the ordinance are at least very doubtful, and that the public would suffer no considerable inconvenience or damage by the granting of a preliminary injunction, while the denial of same would cause great and irremediable loss to petitioner, in the event it finally prevails in the suit. In view of these facts and upon the present record, this case seems to come clearly within the ruling of the circuit court of appeals in the case of *Shreveport v. Shreveport Railway Co.*, 38 Fed. (2d) 945, 69 A. L. R. 340, *supra*, and other cases cited, and this court is of opinion that under said authorities petitioner is entitled to a preliminary injunction to preserve the status pending the trial and determination of the case. It is so decreed in the accompanying order of this date."

A state tax upon electrical energy, generated within the state and irrespective of whether it is sold or delivered within or beyond the state, can not be sustained if the tax is an unreasonable charge on interstate commerce, where there is evidence that much of such energy will be transported as interstate commerce, for as the court said in the case of *Utah Power & Light Co. v. Pfof*, 52 Fed. (2d) 226: "The essential test is whether the tax in fact burdens interstate commerce even though it is laid upon a privilege which the state has power to tax, and is illustrated by those cases which hold that, where one is doing both local and interstate business, the state can nevertheless impose a license tax for doing local business in such amount or manner if it appears that the production of the product is essentially local and indispensable with the carrying on of the business, and that the local interest is paramount. Neither the character of the commodity nor the preparation of it, or the intention of the owner to transport it out of the state, puts it in interstate commerce, for the movement of the commodity for another state must have actually in good faith begun and be going on, and the character of the transportation depends upon all the circumstances looking

to what the owner had done in preparation for the journey and in carrying it out. There is no doubt of the power of the state to impose a license tax upon electrical utility business within the state and to measure it by the standard of production within the state, and whether it would deprive one of constitutional rights depends upon its practical operation and effect. The act here requires that the tax be computed according to the amount of electricity and electrical energy by kilowatt hours generated in the state and measured at the place of production, irrespective of whether it be delivered or sold within or without the state.

* * * When we come to analyze the bill and the affidavits filed on the application for an interlocutory injunction from which we must look to determine whether there is a real dispute over material questions of fact, we find that there is alleged in the bill that the plaintiff owns and operates an interconnected electrical power system consisting of generating stations, transmission and distribution lines, and other electrical equipment located in the states of Idaho, Utah, and Wyoming, whereby electrical energy is generated, transmitted, distributed, and delivered for sale and exchange to its customers in each of said states; that the principal use of the electricity generated by it is at points in the states of Utah and Wyoming, and its stations in Idaho were constructed solely for Utah and Wyoming service, and that its local customers in Idaho have been connected to said stations to gain the economy and convenience thereof; that there is a continuous electric and electro-magnetic path between the windings in the generator and the windings in the consumer's motor; that the entire electric system is a device for transmitting the force (as the falling water) to and applying it at the point where it is to be utilized, and the entire process is a continuous, inseparable transfer of energy from the water through the generators along the lines to the consumer's point of use in Utah and Wyoming; that the measurement of energy 'upon which the tax sought to be imposed by the act is based, is, and will be, a direct measure of the magnitude and duration of interstate commerce in electricity or electrical energy over said system, after said commerce has commenced and during the course thereof.' The affidavits filed by the defendant take an opposite view to that contended for by the plaintiff as to how and at what point the production of electrical energy begins and is completed by plaintiff's system, or that the same is operated in interstate commerce, so it is obvious from the allegation of the bill and what is set forth in the affidavits there is presented

to the court at this stage of the proceedings a real controversy over material questions of fact which can not be satisfactorily determined upon the presentation of affidavits and yet must be determined by the court before the constitutional validity of the act can be determined. * * * The application of the plaintiff for an interlocutory injunction is granted upon the plaintiff giving an adequate bond whereby, in the event the act in question is adjudged valid by the final decree, the plaintiff and its surety will pay such amounts to satisfy the tax fixed by the act with the interest as provided in the act."

This same court in a later case sustained the power of the state in levying a tax on the generation and sale of electric power for sale within the state, expressly excluding such energy which may be sold beyond the state or which was produced beyond the state, unless it be sold for use within the state, as no question of interstate commerce is involved, for as the court said in the case of *South Carolina Power Co. v. South Carolina Tax Comm.*, 52 Fed. (2d) 515: "As to the failure to tax gas companies and the generation of electricity by oil or the use of internal combustion engines, it is elementary that, in levying a tax, a state need not cover the whole field of possible taxation, but that it may classify for that purpose so long as the classification has a reasonable basis. * * * The act before us can not be said to be palpably arbitrary in that it does not tax the generation of electricity by the use of combustion engines, nor because it does not tax persons furnishing gas to the public for light, heat, and power. The business of producing and selling gas is so fundamentally different from the generation of electric power, that to point out the differences which might furnish a basis for the taxation of one and not the other is clearly unnecessary. The same is true of the production of electric current by the use of oil or internal combustion engines. * * * For we are satisfied that the classification of companies producing electricity by water power and steam for purposes of taxation is a reasonable one which must be sustained. * * * Like reasoning applies to the contention that the statute denies the equal protection guarantied by the amendment, in that it exempts from the tax industrial plants generating power for the use of themselves and their employees, and municipalities generating electricity for the use of their customers. Such industrial plants and municipalities are manifestly in an entirely different class from power companies generating electricity for sale to the public. * * * Here the generation of electricity by manufac-

turers for the use of themselves and their employees is clearly no more than an incident of the business of manufacturing in which they are engaged and, both practically and theoretically, stands upon an entirely different footing from the generation of current for sale to the public. * * * The evident purpose of the act is to impose a tax upon the current used within the state and to impose it at the source or as soon as the current becomes subject to the jurisdiction of the taxing power, but not to impose it but once. * * * The statute provides that it shall not apply to electric power generated in another state and brought into South Carolina until such power has lost its interstate character; and the objection is that no means is provided for determining when the current loses its interstate character and becomes subject to the tax. In the light of the evidence as to how current is brought into South Carolina by the South Carolina Power Company, however, this objection loses all substance. The current comes into South Carolina in interstate commerce on high-tension wires at a voltage of 44,000 volts. All of it is used in South Carolina, but before it is used it is 'stepped down' to a lower voltage and thus prepared for use in the state. As we shall show later, it loses its interstate character at this time. * * * The production of an article for transmission in interstate commerce is not in itself such commerce. And there can be no question but that such production is taxable by the state. * * * The current upon which the tax is imposed is the generated low-voltage current; the current transmitted in interstate commerce is the high-voltage current induced in the transformers of the company. The statute does not attempt to impose a tax upon this. * * * For the reasons stated, we think that the interlocutory injunction prayed for must be denied."

A municipal ordinance prohibiting the operation of motor vehicles for hire in interstate commerce on the streets of a municipality until the payment of a substantial municipal license fee, and the providing of liability insurance, will not be sustained where it appears that the license fee is unreasonable in amount as a charge for local traffic, because the motor vehicles were not local carriers but were engaged in interstate commerce, and the fee was not required to cover the cost of constructing and maintaining the streets. This principle is established and discussed as follows in the case of *Sprout v. South Bend, Indiana*, 277 U. S. 163, 72 L. ed. 833, 48 Sup. Ct. 502, where the court said: "By ordinance adopted in 1921, South Bend, Indiana, prohibited, with

exceptions not here material, the operation on its streets of any motor bus for hire unless licensed by the city. Sprout, a resident of that state, operated regularly a bus with seats for twelve persons between points within South Bend and the city of Niles, Michigan. He paid the state registration fee but refused to apply for a city license. * * * The amount of insurance required is limited to a liability of \$1,000 to any one person and of \$2,500 for damages arising from a single accident. The insurance must be furnished by a company authorized to do business within the state. These requirements apply alike to buses operating wholly within the city and to those operating from points within it to points without. The ordinance makes no distinction between buses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce. Nor does the ordinance, in its requirement of liability insurance, distinguish in terms between liability to passengers traveling interstate and other liability resulting from negligent operation. The claim that the ordinance violates the Fourteenth Amendment is rested mainly upon the ground that Sprout is required to furnish insurance issued by a company authorized to do business in Indiana. That contention may be quickly disposed of. The provision limiting the insurance to such companies is obviously a reasonable one so far as Sprout is concerned. * * * The claim that the ordinance violates the commerce clause presents questions requiring serious consideration. Sprout did not carry passengers from one point in South Bend to another. He was not a local carrier. Primarily his business was interstate. But the agreed facts show that he was not engaged exclusively in interstate commerce. * * * The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that state. The actual facts govern. For this purpose, the destination intended for the passenger, when he begins his journey and known to the carrier, determines the character of the commerce. * * * It is true that, in the absence of federal legislation covering the subject, the state may impose, even upon vehicles using the highways exclusively in interstate commerce, nondiscriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of buses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expense of

administering the regulations may be demanded. * * * But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose. It follows that the exaction of the license fee can not be sustained as a police measure. * * * It is true also that a state may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways. * * * And this power also may be delegated in part to a municipality by appropriate legislation. * * * But no part of the license fee here in question may be assumed to have been prescribed for that purpose. A flat tax, substantial in amount and the same for buses plying the streets continuously in local service and for buses making, as do many interstate buses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways. And there is no suggestion, either in the language of the ordinance or in the construction put upon it by the Supreme Court of Indiana, that the proceeds of the license fees are, in any part, to be applied to the construction or maintenance of the city streets. It follows that on the record before us the exaction of the license fee can not be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. * * * But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate. * * * The Supreme Court of Indiana, far from construing the ordinance as applicable solely to buses engaged in intrastate commerce, assumed that it applied to buses engaged exclusively in interstate commerce and that Sprout was so engaged. The privilege of engaging in such commerce is one which a state can not deny. * * * Objection under the commerce clause is made also to the requirement of liability insur-

ance. There being grave dangers incident to the operation of motor vehicles, a state may require users of such vehicles on the public highways to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries, resulting from their operation. * * * Whether the insurance here prescribed is, because of its scope, obnoxious to the commerce clause, we need not inquire. * * * For the ordinance is void because of the imposition of the license fee."

This same court in a later case refused to sustain the power of a state in levying a large tax on motor buses operating in interstate commerce for hire, because the tax did not appear to be laid as compensation for the use of the highways but rather for the privilege of doing interstate business within the state. In denying the state the right to levy this tax, the court said in the case of *Interstate Transit v. Lindsey*, 283 U. S. 953, 75 L. ed. 559, 51 Sup. Ct. 380: "The Tennessee Act of 1927, chapter 89, section 4, imposes upon concerns operating interstate motor buses on the highways of the state a privilege tax graduated according to carrying capacity. It is \$500 a year for each vehicle seating more than twenty and less than thirty passengers. The tax for eight such buses was demanded of *Interstate Transit, Inc.*, an Ohio corporation which operates, exclusively in interstate commerce, a line from Cincinnati, Ohio, to Atlanta, Georgia. * * * As such a charge is a direct burden on interstate commerce, the tax can not be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. * * * A detailed examination of the statute under which the tax here challenged was laid makes it clear that the charge was imposed not as compensation for the use of the highways but for the privilege of doing the interstate bus business. * * * It does not rise with an increase in mileage traveled, or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate buses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory."

A privilege tax on intrastate business where interstate business is expressly excluded, although the supply comes from another state for distribution from interstate mains, will be sustained, because the distribution of the service is local; for as the court said in the recent case of *East Ohio Gas Co. v. Tax Comm. of Ohio*, 283 U. S. 465, 75 L. ed. 1171, 51 Sup. Ct. 499: "Admittedly the exaction is not a tax on property nor in lieu of a property tax. The statute calls it, and in fact it is, a tax for the privilege of carrying on intrastate business. Receipts from interstate business are expressly excluded from the calculation. It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom.

* * * And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business. * * * It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state. * * * 'The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.' * * * The specified excise taxes are laid for the privilege of carrying on intrastate business. The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce."

While reasonable rules and regulations including a provision for a service charge will be sustained by the courts, a public utility can not collect for a service after notice for its discontinuance, for as the court said in the case of *Willapa Electric Co. v. Dennis Constr. Co.* (Wash.), 12 Pac. (2d) 609: "The evidence plainly shows that neither of these consumers has had any need

or requirement for any service or energy between August 27, 1928, when the electric company was notified that the motors of the plant had been disconnected from the electric company's power line, up to the time of the commencement of this action. We do not overlook the words of the contract 'minimum monthly charge under each meter whether energy is used or not, \$1.00 for each horsepower, or fraction thereof, of connected load.' This, we think, means only that, when the consumer maintains a connected load, or wholly disconnects the connected load and fails to notify the electric company of such disconnection, the consumer must pay for the load up to the time of notice of disconnection thereof whether 'used or not'."

While a public utility is subject to proper regulations in the operation of its system, it is not subject to a penalty for a refusal to operate after discontinuing its service where it had a legal right to do so, for as the court said in the case of *State v. Broad River Power Co.*, 164 S. Car. 208, 162 S. E. 93, P. U. R. 1932B, 262: "As this is a penal statute, it must be strictly construed, and the court can not extend its provisions beyond the clear intentment of the legislature. *Holman v. Frost & Co.* (1886), 26 S. Car. 290, 2 S. E. 16; *Johnson v. Seaboard Air Line R. Co.* (1904), 73 S. Car. 36, 52 S. E. 644. From a careful examination of the statute, we can reach no other conclusion than that it was intended to safeguard and regulate the operation of electric cars, but not to apply to a case in which a railway company has discontinued service and refused to operate the railway under claim of legal right to do so; we find nothing in the statute which indicates that the legislature intended it to extend to such latter case—if such had been the intention, it would have been a very simple matter to include appropriate language for that purpose. Accordingly, the injunction must be granted on this ground."

§ 671. **Production and prices—Waste.**—The sale of gasoline being a private business and not affected with a public interest may not be regulated by the state to the extent of fixing the price at which it may be sold, for as the court said in the case of *Williams v. Standard Oil Co.*, 278 U. S. 235, 73 L. ed. 287, 49 Sup. Ct. 22: "These cases were considered together by the court below and are submitted together here. In both the validity of a statute of Tennessee is assailed as contravening the federal Constitution. Appellee in No. 64 is a corporation organized under the laws of Louisiana, and appellee in No. 65 is a corporation organized under the laws of Delaware. From a time long prior to the passage of the statute, both have been engaged and

are now engaged in the business of selling gasoline in the state of Tennessee. The statute was adopted in 1927. Its purpose and effect are to fix prices at which gasoline may be sold within the state. * * * It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' * * * But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.' Those decisions control the present case. * * * The bare recital of these details shows conclusively that they are mere adjuncts of the price-fixing provisions of the law or mere aids to their effective execution. The function of the division created by section 1 is to carry these provisions into effect, and if they be stricken down as invalid the existence of the division becomes without object. The purpose of collecting the data set forth in section 2 is to furnish information to aid in the fixing of proper prices. * * * The taxes imposed by section 10 are solely for the purpose of defraying the expenses of the division of motors and motor fuels, and since the functions of that division practically come to an end with the failure of the price-fixing features of the law, it is unreasonable to suppose that the legislature would be willing to authorize the collection of a fund for a use which no longer exists."

An order of the railroad commission, regulating the production of gas and oil by a private individual for the purpose of maintaining prices by reducing the supply in violation of the natural law under which supply and demand regulates the price, will be set aside as an unreasonable interference with the right of a private individual to produce and market his product and as being beyond the powers delegated to the commission. This principle is discussed and decided as follows in the case of *Mac-Millan v. Railroad Comm. of Texas*, 51 Fed. (2d) 400: "The laws of the state of Texas, enacted to conserve the oil and gas resources of the state, are the source of the commission's power to make and enforce the orders in question, and to them we must

look. Those portions of the statutes pertinent here, defining waste, enjoining the conservation of oil and gas, vesting the commission with authority over persons drilling and operating oil wells in Texas, and authorizing it to make rules and regulations for the conservation of oil and gas, and the prevention of waste thereof, are articles 6014, 6023, and 6029. Under the authority of these statutes, the railroad commission has occupied the field assigned to it by making specific rules and regulations governing the drilling for, the production, and transportation of oil and gas with a view to preventing waste, as defined in the statutes, and injury to the lands of adjoining owners, and these rules, practices, and regulations have been quite uniformly sustained.

* * * Certainly when a subordinate body like the railroad commission of Texas undertakes as here to deal in a broadly restrictive way with the right of a citizen to produce the oil which under the law of this state he owns, it must be prepared to answer his imperious query, 'is it not lawful for me to do what I will with mine own,' by pointing to a clear delegation of legislative power. This must be found, not in the recitative portions of its orders, for the commission may not more than any other agent, lifting itself by its bootstraps, supply, by claiming, the power it does not have, but in the statutes themselves, which have created, which control, and which are the source of the commission's power. Especially must this be so when, as here, under the thinly veiled pretense of going about to prevent physical waste the commission has, in cooperation with persons interested in raising and maintaining prices of oil and its refined products, set on foot a plan which, seated in a desire to bring supply within the compass of demand, derives its impulse and spring from, and finds its scope and its extent in the attempt to control the delicate adjustment of market supply and demand, in order to bring and keep oil prices up. We have searched for but we can not read in any legislative pronouncement, support for what the commission has done here. Authorized as we believe it to be to make rules and regulations reasonable and just, having a true and direct relation to the conservation of oil and gas, we can find no authority for its launching upon the policy in question. This policy of the artificial forcing of prices by governmental action, in cooperation with those in the oil industry interested in raising prices, by either stimulating demand or keeping supply in bounds has never been attempted in this state by the legislature itself; on the contrary, it has heretofore not only established such policy, but has forbidden, by positive penal

laws, the application of such artificial stimuli through private concert and agreement. In the light of such long-established policy, and of the language of the oil conservation statute itself, excluding from the statutory definition 'economic waste,' we think it plain that whether the legislature could lawfully have exercised this power, either directly or through a delegation of it to the commission, it has not only not confided the exercise of it to the commission, but has flatly withheld such power from it. In short, we believe that the orders in question are unreasonable and void as to plaintiffs because issued in the attempted exercise, not of delegated, but of usurped powers. As usurpations, under the authority of the statutes of Texas authorizing this suit, we strike them down."

This same court in a later case, however, sustained the action of the corporation commission of another state, while acting under the authority of a statute providing for the regulation and control of the production of gas and oil for the purpose of conserving the natural resources of the state. The purpose of the act being primarily to prevent waste and to conserve its resources as well as to protect the coequal rights of the owners of other gas and oil producing land, although the effect of limiting production would be to regulate and raise the price, the statute was sustained because the court held this effect was incidental. An interesting discussion of this question and its decision of the legal principles involved, which defines the attitude of our courts in the settlement of a fundamental, economic question is furnished in the case of Champlin Refining Co. v. Corporation Comm. of Texas, 51 Fed. (2d) 823: "The statute has a dual aspect: First, as a penal statute to prevent waste and to protect the coequal rights of the several owners of land situate over a common pool of oil and gas to take from the common source of supply; and, second, a regulatory statute to be supplemented by rules, regulations, and orders of the commission to accomplish the same ends. The penalties provided are for violations of the statute and no penalties are provided for violations of the rules and regulations promulgated by the commission. We are of the opinion that the statute is too indefinite and uncertain to be sustained as a penal statute. *Smith v. Cahoon, Sheriff*, 283 U. S. 553, 51 Sup. Ct. 582, 75 L. ed. 1264. An oil operator should not be required at the peril of severe criminal penalties to determine in the operation of his oil and gas wells whether he is committing economic waste or producing in excess of reasonable market demands because such terms are not

defined in the act and are of uncertain and doubtful meaning. Likewise, a producer from a common source of supply should not be required to determine at the peril of such penalties whether he can operate at full production without committing economic waste or producing in excess of reasonable market demands.

* * * Oil and gas are natural resources which can not be replaced, and the power of the state to impose reasonable regulations to prevent waste in the production, handling, and marketing thereof is undoubted. *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 584, 44 L. ed. 729; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. ed. 369, Ann. Cas. 1912C, 160; *Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 Sup. Ct. 118, 65 L. ed. 276. * * * The production of oil and gas in excess of transportation or marketing facilities or in excess of market demands results in above-ground storage. At the time this statute was enacted, as shown by the orders of the commission, it resulted in large amounts of such storage in earthen reservoirs, with resultant waste through seepage and evaporation. It is a well-known fact in the oil industry that oil can be best stored underground. Furthermore, it is established by the evidence that to permit oil wells to flow at their maximum flush production results in the use of an excessive amount of gas pressure, an uneconomical and wasteful use of gas energy in lifting the oil, and a tremendous loss in ultimate recovery. This is of particular importance in a pool such as the Oklahoma City pool where the wells are of tremendous depth and the cost of artificially raising the oil will be unusually great. It is important that the wells shall be permitted to produce with the lowest practical gas-oil ratio, to the end that the gas pressure shall be preserved throughout a long period and the greatest ultimate recovery of gas and oil obtained. * * * It may be that the restriction on production imposed by the statute will prevent a supply in excess of the market demands, and thus indirectly tend to sustain the price of oil and gas. But such is not the main purpose of the statute, and the fact that it may have an indirect effect on prices does not, in our opinion, render it invalid. * * * The theory upon which the orders are predicated is that oil from a given pool shall not be produced in excess of the market demands therefor, in order to prevent wasteful storage and wasteful use of gas pressure in lifting the oil. * * * Under these circumstances, we are of the opinion that the limiting of the taking to the market demands is a reasonable regulation for the prevention of waste and the protection of the co-

equal rights of the owners of land over such pool. 'Where the public interest is involved preferment of that interest over the property interest of the individual, * * * is one of the distinguishing characteristics of every exercise of the police power which affects property.' *Miller v. Schoene*, 276 U. S. 272, 280, 48 Sup. Ct. 246, 247, 72 L. ed. 568, and cases there cited. As observed with respect to the act itself, the object of the orders is to prevent waste and to protect the coequal rights of the owners of land over the common pool, and the fact that such orders tend to prevent the oversupply of oil and gas in excess of market demands and indirectly affect the prices thereof, does not make them price-fixing in character, and for that reason invalid.

* * * The fact that the Seminole field is permitted a greater percentage of its potential production than is the Oklahoma City field is not necessarily a discrimination in favor of the former. The Seminole field is an older one, is more favorably located with reference to the large interstate pipelines, and naturally has a larger market demand. It has passed the period of flush production. These circumstances justify a larger percentage of allowable production for the Seminole field. * * * We think there was a substantial compliance with section 5 of the act, and that no discrimination between producing wells resulted from the method by which the potentials thereof were determined.

* * * They are predicated on the provisions of section 9 of the act. This provision is penal in character and is for the purpose of punishing violations of the provisions of the act itself (not the orders of the commission), as a criminal statute. For the reasons hereinbefore indicated, we think this section is void and that such proceedings in the state courts should be enjoined. We are clearly of the opinion that the scheme of proration is not invalid as a regulation of or burden on interstate commerce. It is true that a substantial portion of the oil produced in this state goes into the channel of such commerce. But in order to conflict with the regulatory power of congress, there must be a direct burden thereon. In this case, the interference is entirely too remote in character. The principle is too well settled to require citation, that the congressional power of regulation attaches only when interstate transportation has begun."

The action of the corporation commission in prohibiting the production of petroleum in such a manner or under such conditions as resulted in its waste, where the production was from a common source from which a number of parties had the right to produce oil, will be sustained by the courts in the interest of

the conservation of natural resources and for the prevention of their waste, and to avoid discrimination in the rights of a number of parties to extract oil from a common source. This rule is established for the purpose of curtailing production and preventing waste of crude oil which would result from unregulated overproduction, due to inadequate storage facilities and market demands. What constitutes waste in such production is a question of fact and depends upon conditions which are subject to change, so that a penalty, imposed for the violation of the statute which provides for the prevention of waste, and is so indefinite in its application and vague in its terms as to be invalid, is not enforceable. Another provision of this conservation act which provides for the appointment of a receiver for oil wells as a further punishment for the violation of the provision of the act by way of imposing additional penalties is also invalid because it amounts to the taking of property without compensation. These principles were discussed and established as follows in the case of *Champlin Refining Co. v. Corporation Commission of Oklahoma*, — U. S. —, 76 L. ed. 1062, 52 Sup. Ct. 559: "The act prohibits the production of petroleum in such a manner or under such conditions as constitute waste. * * * Whenever full production from any common source can only be obtained under conditions constituting waste, one having the right to produce oil from such source may take only the proportion of all that may be produced therefrom without waste as the production of his wells bears to the total. The commission is authorized to regulate the taking of oil from common sources so as to prevent unreasonable discrimination in favor of one source as against others. * * * The commission construes the act as intended to empower it to limit production to the amount of the reasonable daily market demand and to require ratable production by all taking from the common source. In current orders it has found that waste of oil will result in the prorated areas unless production is limited to such demand. * * * The court found that at all times covered by orders involved there was a serious potential overproduction throughout the United States and particularly in the flush and semiflush pools in the Seminole and Oklahoma City fields; that, if no curtailment were applied, crude oil for lack of market demand and adequate storage tanks would inevitably go into earthen storage and be wasted. * * *

The evidence before the trial court undoubtedly sustains the findings above-referred to, and they are adopted here. Plaintiff here insists that the act is repugnant to the due process and

equal clauses of the Fourteenth Amendment. We need not consider its suggestion that the business of production and sale of crude oil is not a public service and that it does not devote its property to the public use. The proration orders do not purport to have been made, and in fact were not made, in respect of services or charges of any calling so affected with a public interest as to be subject to regulation as to rates or prices. Plaintiff insists that it has a vested right to drill wells upon the lands covered by its leases and to take all the natural flow of oil and gas therefrom so long as it does so without physical waste and devotes the production to commercial uses. But if plaintiff should take all the flow of its wells, there would inevitably result great physical waste even if its entire production should be devoted to useful purposes. The improvident use of natural gas pressure inevitably attending such operations would cause great diminution in the quantity of crude oil ultimately to be recovered from the pool. Other lessees and owners of land above the pool would be compelled, for self-protection against plaintiff's taking, also to draw from the common source and so to add to the wasteful use of lifting pressure. And because of the lack, especially on the part of the nonintegrated operators, of means of transportation or appropriate storage and of market demand, the contest would, as is made plain by the evidence and findings, result in surface waste of large quantities of crude oil. * * * But the right to take and thus to acquire ownership is subject to the reasonable exertion of the power of the state to prevent unnecessary loss, destruction or waste. And that power extends to the taker's unreasonable and wasteful use of natural gas pressure available for lifting the oil to the surface and the unreasonable and wasteful depletion of a common supply of gas and oil to the injury of others entitled to resort to and take from the same pool. It is not shown that the rule for proration prescribed in section 4 or any other provision here involved amounts to or authorizes arbitrary interference with private business or plaintiff's property rights or that such statutory rule is not reasonably calculated to prevent the wastes specified in section 3. * * *

The court found that none of the proration orders here involved were made for the purpose of fixing prices. The fact that the commission never limited production below market demand and the great and long continued downward trend of prices contemporaneously with the enforcement of proration strongly support the finding that the orders assailed have not had that effect. * * *

It is clear that the regulations prescribed and author-

ized by the act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. Such production is essentially a mining operation and therefore is not a part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce. * * * The plaintiff is not entitled to have the commission's orders set at naught and the purposes of the act thwarted merely because, in the absence of legislative appropriations therefor, the salaries and expenses of agents or employees were paid out of funds raised by operators interested in having proration established under the statutory rule. Proration, required to prevent waste defined in section 3 and to give effect to the rule prescribed by section 4, changes according to conditions existing from time to time and percentages valid at one time may be inapplicable, unjust and arbitrary at another. *Bluefield Waterworks & Improv. Co. v. Public Service Commission*, 262 U. S. 679, 693, 67 L. ed. 1176, 1183, 43 Sup. Ct. 675; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 19, 53 L. ed. 371, 382, 29 Sup. Ct. 148. As plaintiff has failed to prove that any order in force at the time of the trial was not in accordance with the rule prescribed by section 4 or otherwise invalid, the part of the decree from which it appealed will be affirmed. But such affirmance will not prevent it in an appropriate suit, a different state of facts being shown to exist, from having an injunction to restrain the enforcement of any order proved to be not authorized by the act or unjust and arbitrary and to operate to plaintiff's prejudice. Cf. *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 395, 71 L. ed. 303, 313, 54 A. L. R. 1016, 47 Sup. Ct. 114. * * * Undoubtedly section 8, if invalid, may be severed from other parts of the act without affecting the provisions under which the prorations were made. *Ohio Tax cases*, 232 U. S. 576, 594, 58 L. ed. 738, 746, 34 Sup. Ct. 372. It follows that the lower court erred in passing upon the validity of that section, and the decree will be modified to declare that no question as to section 8 was before the court. Defendants also maintain that no question as to the validity of section 9 was before the court. * * * Plainly such a taking deprives the owner of property without compensation even if the moneys received for oil sold less expenses are accounted for by the receiver. The suit is prosecuted by the state to redress a public wrong denounced as crime. The provisions of section 9 are not consistent with any purpose other than to inflict punishment for violation of the act and they must be deemed as intended to im-

pose additional penalties upon offenders having oil producing wells. * * * In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

The Supreme Court of the United States has recently sustained a statute providing for regulation and control of the production of gas and oil by the state for the protection of the coequal or correlative rights of adjoining property owners, having access to a common source of supply of gas and oil. In the course of its opinion on this very important and far-reaching question of the economic rights of private individuals to produce and market their property, the court furnishes the following very interesting discussion of the legal principles involved in the case of *Bandini Petroleum Co. v. Superior Court*, — U. S. —, 76 L. ed. 136, 52 Sup. Ct. 103, saying: "In September, 1929, the state, acting through its director of natural resources, brought suit in the superior court of the state against the appellants and others, seeking to enjoin an alleged unreasonable waste of natural gas in that field. The authority for the suit was found in sections 8b and 14b of what is called the Oil and Gas Conservation of California. Cal. Stat. 1915, chapter 718; 1917, chapter 759; 1919, chapter 536; 1921, chapter 912; 1929, chapter 535. Section 8b prohibits 'the unreasonable waste of natural gas,' and section 14b authorizes suit by the director of natural resources to enforce the prohibition. The superior court granted a preliminary injunction after a hearing upon the pleadings, affidavits, oral testimony and documents submitted. The court recited in its order that there appeared to be an unreasonable waste of natural gas in the Santa Fe Springs oil field, and that an injunction was necessary in order 'to preserve the subject-matter of the action to abide the decree of the court at the conclusion of the trial.' The court restricted the average daily production of 'net formation gas' from 'any lease or other property unit' to the amount shown for each operator in an accompanying schedule. * * *

This court has jurisdiction. The proceeding for a writ of prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of section 237 (a) of the Judicial Code. U. S. C., title 28, section 344. * * *

That judgment, however, merely dealt with the jurisdiction of the

superior court of the suit for injunction, and the only question before us is whether the district court of appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based. * * * The district court of appeal overruled the contention that the statute was so uncertain and devoid of any definition of a standard of conduct as to be inconsistent with due process. The Supreme Court of the state, reaching the same conclusion (in the opinion above cited, 211 Cal. 93, 106, 294 Pac. at p. 724) described the general condition in which oil and gas were found in California and the standard which the court considered to be established by the statute. * * * It is estimated that only from ten to twenty-five per cent of the total amount of oil deposited in a reservoir is ultimately recovered, depending on the natural characteristics of the reservoir and the methods employed in utilizing the lifting power of the gas. The importance of gas in the oil-producing industry has, therefore, become a question of great concern to the industry itself and to government, to the end that its function may be fully utilized without waste. * * * In view of these circumstances, the Supreme Court concluded that it might be said that there was an 'unreasonable waste' of gas where it 'has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion.' It was such a waste of gas, the court said, that the legislature of California intended to prohibit. * * * The statute is to be read with the construction placed upon it by the state court. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 73, 55 L. ed. 369, 375, 31 Sup. Ct. 337, Ann. Cas. 1912C, 160. And so read, we find no ground for concluding that the statute should be regarded as invalid upon its face, merely by reason of uncertainty, so as to deprive the superior court of jurisdiction to consider the relevant questions of fact and to determine with respect to a particular field whether or not there has been the unreasonable waste of gas which the statute condemns. * * * The question remains whether the statutory scheme of regulation, with the standard which it sets up under the construction of the state court, is on its face beyond the power of the state. * * * And, replying to the suggestion that the legislature was without authority to restrict the production of oil, the district court of appeals concluded its opinion with the statement that the record did not 'indicate that the temporary injunction was founded upon such a theory. Nor are we determining that the act attempts to confer upon the court any such power.

Rather we are convinced that a proper construction of the enactment confines the authority within the limits of enjoining the production of gas when in excess of the reasonable proportion to the oil for the particular field involved, when not conveniently necessary for other than lifting purposes.' — Cal. App. —, 293 Pac. 907. * * * If the statute be viewed as one regulating the exercise of the correlative right of surface owners with respect to a common source of supply of oil and gas, the conclusion that the statute is valid upon its face, that is, considered apart from any attempted application of it in administration which might violate constitutional right, is fully supported by the decisions of this court. *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 210, 211, 44 L. ed. 729, 739, 740, 20 Sup. Ct. 576, 20 Mor. Min. Rep. 466; *Linsley v. Natural Carbonic Gas Co.*, 220 U. S. at p. 77, 55 L. ed. 377, 31 Sup. Ct. 337, Ann. Cas. 1912C, 160, supra; *Walls v. Midland Carbon Co.*, 254 U. S. 300, 323, 65 L. ed. 276, 286, 41 Sup. Ct. 118. In that aspect, the statute unquestionably has a valid operation, and it can not be said that the superior court was without jurisdiction to entertain the suit in which the injunction order was granted."

§ 672. **Private utilities.**—The maintenance and operation of theaters and other places of amusement is a private business enterprise and the price for admission to the entertainment offered by such enterprise may not be regulated by the state on the theory that the business is one affected with a public interest, for as the court said in the case of *Tyson v. Banton*, 273 U. S. 418, 71 L. ed. 718, 47 Sup. Ct. 426, 58 A. L. R. 1236: "A theater is a private enterprise, which, in its relation to the public, differs obviously and widely, both in character and degree, from a grain elevator, standing at the gateway of commerce and exacting toll, amounting to a common charge, for every bushel of grain which passes on its way among the states; or stock yards, standing in like relation to the commerce in livestock; or an insurance company, engaged, as a sort of common agency, in collecting and holding guaranty fund in which definite and substantial rights are enjoyed by a considerable portion of the public sustaining interdependent relations in respect of their interests in the fund. Sales of theatre tickets bear no relation to the commerce of the country; and they are not interdependent transactions, but stand, both in form and effect, separate and apart from each other, 'terminating in their effect with the instances.' And, certainly a place of entertainment is in no legal sense a public utility; and, quite as certainly, its activities are not such that their enjoy-

ment can be regarded under any conditions from the point of view of an emergency. The interest of the public in theaters and other places of entertainment may be more nearly, and with better reason, assimilated to the like interest in provision stores and markets and in the rental houses and apartments for residence purposes; although in importance it falls below such an interest in the proportion that food and shelter are of more moment than amusement or instruction. As we have shown, there is no legislative power to fix the prices of provisions or clothing or the rental charges for houses or apartments, in the absence of some controlling emergency; and we are unable to perceive any dissimilarities of such quality or degree as to justify a different rule in respect of amusements and entertainments."

The jurisdiction of public service commissions is limited to the regulation of public utilities and they have no power or authority to regulate or control such private utilities as newspapers, ice companies, and the like, for these are private business enterprises and the conducting of such lines of business belong to their owners and not to public service commissions, as is clearly indicated in the case of *In re Louis Wohl, Inc.*, 50 Fed. (2d) 254, P. U. R. 1931D, 361, where the court said: "The Tyson and the Ribnik cases, *supra* [quoted from in this section], far from showing that the trend of decision is as urged by the trustee, indicate rather that the Supreme Court has gone as far as it proposes to go in declaring private business to be affected with a public interest. The German Alliance Insurance Company case, 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. 612, *supra*, goes as far in that direction as the Supreme Court is likely to go. * * * Certainly a newspaper published locally is not in any respect to be compared in its public importance with an insurance company whose rates are determined by averages computed on losses suffered throughout the country. * * * I find from the foregoing that there is no such trend of decision as the trustee urges. A newspaper is not at common law a business clothed with a public interest."

Although the state may regulate the business of employment agencies by requiring a license for the privilege of doing such business, it may not fix prices which the agency shall charge for its services, because the business is private in its nature and not affected with the public interest any more than the sale of theater tickets may be so regulated, and the courts do not hesitate to declare such statutory enactments unconstitutional for that reason, as is indicated by the court in the case of *Ribnik*

v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 Sup. Ct. 545: "That the state has power to require a license and regulate the business of an employment agent does not admit of doubt. But the question here presented is whether the due process of law clause is contravened by the legislation attempting to confer upon the commission of labor power to fix the prices which the employment agent shall charge for his services. * * * Or, in other words, is the business one 'affected with a public interest,' within the meaning of that phrase as heretofore defined by this court? As was recently pointed out in *Tyson & Bro. United Theatre Ticket Offices v. Banton*, 273 U. S. 418, 430, 71 L. ed. 718, 722, 58 A. L. R. 1236, 47 Sup. Ct. 426, the phrase is not capable of exact definition; but, nevertheless, under all the decisions of this court from *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, it is the standard by which the validity of price-fixing legislation, in respect of a business like that here under consideration, must be tested. In the *Tyson & Bro. United Theatre Ticket Offices Case* it was said (p. 430) that the interest meant was not 'such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business. * * * The business must be such (p. 434) 'as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, granted to the public. * * * In the *Tyson & Bro. United Theatre Ticket Offices Case*, supra, we declared unconstitutional an act of the New York legislature which sought to fix the price at which theatre tickets should be sold by a ticket broker, and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld. An employment agency is essentially a private business. * * * But in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control. *Chas. Wolff Packing Co. v. Court of Industrial Relations*, supra, p. 536 (67 L. ed. 1108, 27 A. L. R. 1280, 43 Sup. Ct. 630). Under the decisions of this court it is no longer fairly open to question that, at least in the absence of a grave emergency, *Tyson & Bro. United Theatre Ticket Offices v. Banton*, supra, pp. 431, 437 (71 L. ed. 723, 725, 58 A. L. R. 1236, 47 Sup. Ct. 426) the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a

place. * * * There are a number of states which have statutes like that now under consideration, and we are asked to give weight to that circumstance. It is to be observed, however, that with the exception of the decision now under review none of these statutes has been judicially considered, except in the state of California, where the legislation was declared unconstitutional. *Ex parte Dickey*, 144 Cal. 234, 66 L. R. A. 928, 103 Am. St. 82, 77 Pac. 924, 1 Ann. Cas. 428; *In re Smith*, 193 Cal. 337, 223 Pac. 971. * * *

While public utilities are natural monopolies and may be regulated as such for that reason by the state or its public utility commission, the manufacture and sale of ice is a private business and may not be so regulated. While the operation of cotton gins and even grist mills may be affected with a public interest and devoted to a public use, the business of producing and selling ice, like that of the groceryman, the butcher, the baker, or the tailor, is not a natural monopoly but a private business enterprise and its control and operation belong to its owner rather than to the state or its public utility commission. This legal principle and the reasons upon which it is established, together with its application to questions of business policy, are clearly stated and discussed as follows in an interesting and convincing manner by the Supreme Court of the United States in the case of *New State Ice Co. v. Liebmann*, — U. S. —, 76 L. ed. 747, 52 Sup. Ct. 371, P. U. R. 1932B, 433: "The New State Ice Company, engaged in the business of manufacturing, selling and distributing ice under a license or permit duly issued by the corporation commission of Oklahoma, brought this suit against Liebmann in the federal district court for the western district of Oklahoma to enjoin him from manufacturing, selling and distributing ice within Oklahoma City without first having obtained a like license or permit from the commission. The license or permit is required by an act of the Oklahoma legislature, chapter 147, Session Laws, 1925. That act declares that the manufacture, sale and distribution of ice is a public business; that no one should be permitted to manufacture, sell or distribute ice within the state without first having secured a license for that purpose from the commission. * * * The district court dismissed the bill of complaint for want of equity, on the ground that the manufacture and sale of ice is a private business which may not be subjected to the foregoing regulation. 42 Fed. (2d) 913. The court of appeals affirmed. 52 Fed. (2d) 349. * * * The Frost case is relied on here. That case dealt with the business

of operating a cotton gin. It was conceded that this was a business clothed with a public interest, and that the statute requiring a showing of public necessity as a condition precedent to the issue of a permit was valid. But the conditions which warranted the concession there are wholly wanting here. It long has been recognized that mills for the grinding of grain or performing similar services for all comers are devoted to a public use and subject to public control, whether they be operated by direct authority of the state or entirely upon individual initiative.

* * * The cotton gin bears the same relation to the cotton grower that the old grist mill did to the grower of wheat. The individual grower of the raw product is generally financially unable to set up a plant for himself; but the service is a necessary one with which, ordinarily, he can not afford to dispense. He is compelled, therefore, to resort for such service to the establishment which operates in his locality. So dependent, generally, is he upon the neighborhood cotton gin that he faces the practical danger of being placed at the mercy of the operator in respect of exorbitant charges and arbitrary control. The relation between the growers of cotton, who constitute a very large proportion of population, and those engaged in furnishing the service, is thus seen to be a peculiarly close one in respect of an industry of vital concern to the general public. These considerations render it not unreasonable to conclude that the business 'has been devoted to a public use and its use thereby, in effect, granted to the public.' * * * We have thus, with some particularity, discussed the circumstances which, so far as the state of Oklahoma is concerned, afford ground for sustaining the legislative pronouncement that the business of operating cotton gins is charged with a public use, in order to put them in contrast with the completely unlike circumstances which attend the business of manufacturing, selling and distributing ice. Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so

than food or clothing or the shelter of a home. And this court has definitely said that the production or sale of food or clothing can not be subjected to legislative regulation on the basis of a public use; and the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. See *Tyson & Bro. United Theatre Ticket Offices v. Banton*, *supra*. (273 U. S. pp. 437, 438, 71 L. ed. 725, 726, 58 A. L. R. 1236, 47 Sup. Ct. 426) and cases cited. * * * We know, since it is common knowledge, that today, to say nothing of other means, wherever electricity or gas is available (and one or the other is available in practically every part of the country), anyone for a comparatively moderate outlay may have set up in his kitchen an appliance by means of which he may manufacture ice for himself. Under such circumstances it hardly will do to say that people generally are at the mercy of the manufacturer, seller and distributor of ice for ordinary needs. * * * Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. * * * It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary. Nor is it a case of the protection of natural resources."

CHAPTER 27

REGULATIONS FOR RENDERING TELEPHONE SERVICE

Section	Section
675. Facts peculiar to telephone service.	689. Undertaking to furnish connected service becomes general.
676. Competition extravagant—Ineffective as regulation.	690. Holding out consolidated service establishes it permanently.
677. Expense of duplication carried by customer—Indefensible.	691. Exclusive contract for through service upheld from necessity.
678. Competition in telephone service peculiarly undesirable.	692. Necessity for exclusive service question of fact.
679. Efficient public regulation of telephone especially necessary.	693. Common-law and statutory regulations distinguished.
680. Requirements for physical connection of telephone plants.	694. Public and private business distinguished.
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682. Contracts for connected or through service.	696. Service of common carrier and telephone distinguished.
683. Physical connection only by contract or state requirement.	697. Cost and value of telephone service with increase of subscribers.
684. Classification of telephone service.	698. Doctrine of increasing cost of service peculiar to telephone.
685. Physical connection by constitutional provision.	699. Value of service increases with its amount.
686. Statutory and constitutional requirements upheld.	700. No discrimination in rates or limitation of service.
687. Physical connection by contract available to all alike.	701. Collateral contracts.
688. Through telephone service peculiarly necessary.	

§ 675. Facts peculiar to telephone service.¹—The furnishing of telephone service may be distinguished from providing that of any other municipal public utility, and by virtue of this fact it is governed by laws, some of which are peculiar to itself. A customer of a municipal public utility providing water, gas, light, heat or power as a general rule may be furnished with adequate and complete service by the particular municipal public utility with which he contracts, although there may be a dupli-

¹ This section (§ 546 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

cation of such service available by the existence of another similar municipal public utility rendering the same kind of service alongside and parallel with the competing company with which the particular customer has contracted for his service. In the case of the municipal public utility furnishing telephone service, however, in a field where a competing company is also providing such service, neither company alone and independent of the other can furnish adequate or complete service unless, which practically never occurs, both companies have identically the same list of customers, except where the competing companies make physical connection of their equipment by the use of a common switchboard which gives and receives messages from all customers of either company.

In distinguishing between the nature of the service rendered by telephone and telegraph companies respectively, it is apparent that while the latter company makes a separate contract and transmits the message itself, the telephone company provides the equipment and facilities necessary for the subscriber himself to transmit the message by carrying on the communication. This distinction is due to the nature of the service afforded by the respective companies and is not due or governed by public regulations, and as the telephone company does not hold itself out ordinarily as undertaking to transmit or relay messages, it can not be held liable for not doing so, for as the court said in the case of *Mentzer v. New England Tel. & T. Co. (Mass.)*, 177 N. E. 549: "The telephone company puts its instrument and mechanisms in the premises of its subscribers and engages to render service for a stated time for specified compensation. A telegraph company commonly makes a separate contract for each message accepted by it for transmission. The transmission of intelligence by electricity is a business of a public character, to be exercised under reasonable public regulation subject to the same general principles as govern transportation of goods or passengers by common carriers. A telephone company within this commonwealth as matter of common knowledge does not undertake to transmit messages for the general public or for its subscribers. Its business is to afford to its subscribers and others opportunity to hold conversation with others and to transmit their messages by their own voices through the instrumentalities and facilities afforded by it. It is no part of the ostensible authority of its ordinary agents to undertake to receive messages and by their own voices to transmit them to others. No public regulations govern the situation disclosed on this record. The rights

and liabilities of the respective parties depend wholly upon the arrangements, express or implied, made between them in the light of their positions with reference to each other and of the public duty of the defendant. * * * The duty of the defendant in those circumstances, as shown on this record, is not a general one to transmit the message; its duty is to make the connection and await the action of the person giving the call. A duty on the defendant to pass the message on arises only in the event that the person making the emergency call is not at his telephone when the connection is made. Moses H. Mentzer did not remain at his telephone to await the connection. He undertook to charge the defendant with the obligation to transmit the message. He was under no exigency to leave the telephone before the connection was made. The telephone was accessible for more than an hour after his call. He did not try to make a second call. * * * Telephone companies 'can not be required to furnish a service which they do not hold themselves out as undertaking to furnish.' *New England Telephone & Telegraph Co. v. Department of Public Utilities*, 262 Mass. 137, 146, 159 N. E. 743, 747, 56 A. L. R. 784. The record does not disclose any obligation imposed by public authority requiring a telephone operator to transmit or relay emergency messages in the circumstances here disclosed."

§ 676. **Competition extravagant—Ineffective as regulation.**²—The universal objection to competition of municipal public utility systems is the economic one of the unnecessary duplication of the investment and the expense of maintenance and operation of two parallel systems where one could render adequate service at practically one-half the cost of installation, maintenance and even of operation in at least some cases where the cost of the material is only nominal; as for example, the furnishing of a water supply, where there is practically an unlimited free source of supply available. Nor is this economic objection overcome or even met by the legal theory which formerly prevailed as the sole controlling reason for the supposed advantages arising from competitive conditions as the proper means of regulating the service rendered or the rate charged for it, for it is now very generally recognized that in case of municipal public utilities which are natural monopolies, competition is at once an expensive and absolutely ineffective ultimate method of regulat-

² This section (§ 547 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

ing either the rates or the service of the modern municipal public utility.

On the theory that competition in rendering telephone service is extravagant and tends to interfere with the best service under proper regulation and control an order of the commission, in dividing the territory for adjoining companies and preventing interference in rendering the service, will be sustained in the interest of economical and efficient service, for as the court said in the case of *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 167 N. E. 860, P. U. R. 1930A, 295: "In this case the commission applied the principle by assigning to the appellant company and the appellee company territory to be served and must protect each from invasion by the other. Notwithstanding the public character of the utility is not determined by the number resorting to its service or willing to accept it, the individual appellants argue that the commerce commission has no constitutional right to assign them to any territory. The fallacy of the contention lies in the assumption that said appellants are assigned to a territory by order of the commission. It exercised the power vested in it to determine whether the Modesto Company had invaded the territory of appellee by undertaking to serve the three individual appellants and others not complaining of the order. The commission decided from the evidence before it, as the basis for the orders affecting the individual appellants, that they reside nearer to the village of Palmyra and therefore the Palmyra Company should serve them, and for that reason directed the appellant company to desist from serving them. All of the orders are directed to or against the utility companies. None of the orders require any one to patronize either company."

§ 677. **Expense of duplication carried by customer—Indefensible.**³—Indeed, as the rates received from the service rendered must carry the investment and meet the expense of furnishing the service, it inevitably follows that in case there is a duplication of municipal public utilities rendering similar service along parallel lines the rate must be materially higher in order to secure the same return on the investment as in the case where a single municipal public utility furnishes all the service. Accordingly, since competition ultimately fails to control the service rendered by municipal public utilities, because they are natural monopolies, and as it inevitably must increase rather than decrease the rate in order to give the same return upon the invest-

³ This section (§ 548 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

ment, there remains neither the economic nor the legal justification for a duplication in the service of municipal public utilities. As the force of competition is no longer recognized as effective in controlling the service and regulating the rates of municipal public utilities, the authorities agree that the necessity for public regulation and control is absolute and undisputed, for in its absence, experience and common observation have indicated too often for there to remain room for doubt, that the service may be subjected to all the charges that the traffic will bear.

§ 678. **Competition in telephone service peculiarly undesirable.**⁴—For all these reasons as well as for the additional one before suggested, that neither of the duplicated municipal public utility systems rendering telephone service can in the very nature of things render service that is either adequate or complete, it follows that competition as a means of regulating telephone service or controlling its rates results in more inconvenience and expense and is the least justifiable of all existing forms of municipal public utility service, and conversely that the need of public regulation and control by impartial experts in this case of the telephone is greater than in any other.

§ 679. **Efficient public regulation of telephone especially necessary.**⁵—Intelligent control of the municipal public utility furnishing telephone service by the public is peculiarly necessary for the additional reason that this business is the most complex and least understood of any of the municipal public utilities, and the expectation of the public in the past that this form of municipal public utility would regulate itself and take care of the interests of the public, or that any attempt on the part of the public without the assistance of technical, unprejudiced experts of the subject to understand this form of municipal public utility business or fairly to regulate its service and determine the reasonable rate to be charged for it, must inevitably fail. The many failures to understand and fairly regulate the service of this municipal public utility without the help of trained experts furnishes the best argument and the most convincing illustration that the question of regulating all municipal public utilities and of determining what is a reasonable rate to be charged for their service can only be fairly and satisfactorily determined by an administrative body or commission of unbiased trained experts.

⁴ This section (§ 549 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

⁵ This section (§ 550 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

In regulating the service and fixing the rate of telephone companies, the railroad commission is charged with the duty of regulating the issue of telephone directories because they are a necessary instrumentality in rendering the service, and the cost and receipts for them are subject to the control of the commission. This principle is established and discussed as follows in the case of *California Fireproof Storage Co. v. Brundige*, 199 Cal. 185, 248 Pac. 669, P. U. R. 1926E, 852: "This is an application for a writ of mandate to compel the railroad commission to assume jurisdiction of a complaint against the Southern California Telephone Company, filed by petitioner herein. * * * The single question presented in this proceeding is as to whether the railroad commission has, and should, assume jurisdiction over the telephone directories of the Southern California Telephone Company, a public service corporation, and over the matter of the form and content of such directories, and over the matter of the charges and receipts of said corporation connected with, and accruing from, the publication, distribution, and use of such directories. A telephone directory is an essential instrumentality in connection with the peculiar service which a telephone company offers for the public benefit and convenience. It is as much so as is the telephone receiver itself, which would be practically useless for the receipt and transmission of messages without the accompaniment of such directories. The form which such directories conveniently took with the inception of this modern method of message transmission was that of an alphabetical list of the names of the subscribers to the service, and there can be no question as to the right of the regulatory body over this form of public utility to regulate the form, content, and cost thereof to subscribers who had entitled themselves to the convenient use of such service. * * * The telephone service in its relation to the public, and in its general and practical operation, is, or at least tends to be, a natural monopoly; and, this being so, it is, in an especial sense, the proper subject of public regulation and control. If in the employment of one of its essential instrumentalities it undertakes to so manipulate its form and use as to make a considerable profit out of that portion of the public which it is thus enabled to serve, we are of the opinion that such profit should be taken account of by the regulating body as are the other earnings of this public utility in determining what just and reasonable rates should be allowed and paid by the public for the service it provides."

While the state commission generally has the power to regulate and control telephone companies and their operation in rendering their service, this does not include the right to interfere unduly with matters of business policy and methods of installing their equipment to the extent of regulating the selection and style of equipment, for these are matters of business judgment which belong to the company, and any undue interference with the management of the company and the selection of its equipment will be set aside as an unreasonable and arbitrary action on the part of the commission. This principle is established and discussed as follows in the case of *New England Tel. Co. v. Department of Public Utilities*, 262 Mass. 137, 159 N. E. 743, P. U. R. 1928B, 396: "There must be a fair opportunity for submitting the issue of confiscation or of undue interference with the right of management to a judicial tribunal for determination upon its own independent judgment as to both law and facts.

* * * This court is not bound by the decision of the commission that the evidence was immaterial, and can give it due weight. * * * The court can not intervene because of any difference of opinion with regard to the wisdom of any order made in the exercise of their jurisdiction by the commissioners of the department. *People of State of New York ex rel. New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 38 Sup. Ct. 122, 62 L. ed. 337. Only to the extent that it transcends the law can we deal with it. *City Council of Salem v. Eastern Massachusetts St. R. Co.*, 254 Mass. 42, 149 N. E. 671. * * * Thus it requires the telephone company to become owners of property which later it may be called on to reject because it is incompatible with performing the service which it undertakes to give. This is an unreasonable interference with its rights of property. The determination whether certain wires are suitable and are properly installed is a detail of management in the administration of the business of the telephone company. * * * It is manifest that expense is imposed upon the telephone company if, as is certain, it must undertake investigation of wires and wiring not selected and constructed under its direction, and be charged with disposing of them if found unsuitable. The orders, consequently, are illegal."

§ 680. Requirements for physical connection of telephone plants.⁶—The fact that where there is a duplication of municipal public utilities rendering telephone service in the same lo-

⁶ This section (§ 551 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

cality, neither independently of the other can furnish complete service, has resulted in some of the states requiring such companies to make physical connection of their plants and to serve impartially the customers of either municipal public utility by the installation of a common switchboard or trunk line between the exchanges of the duplicating companies upon payment of a reasonable amount to be fixed by appraisement. Decisions in other states, where this requirement is not made by virtue of a constitutional provision or statutory enactment, have held that while at common law such an action can not be required, if by agreement between the competing companies such a connection is made, the advantage resulting from the connection or the use of a common switchboard or trunk line between the exchanges of the different municipal public utilities becomes available to all the members of the public who are customers of telephone service on the theory that the agreement of the municipal public utilities in making such a physical connection between their systems constitutes a declaration of their intention to waive the common-law right of operating their plants independently and subjects their property to the additional burden of serving all the public who desire telephone service.

§ 681. **Contracts restricting service in restraint of trade.**⁷—This doctrine is peculiar to municipal public utilities furnishing telephone service which makes their control all the more complex, and while the courts have held that the state may require such municipal public utilities physically to connect their plants or having voluntarily agreed to do so for some of their customers that they are obliged to extend the same privilege to all, the decisions are not agreed as to the extent of the obligation assumed by the companies in making such an agreement or as to how far it becomes available to other similar and competing municipal public utilities and to their customers and the public generally. Some of the courts have upheld an agreement by a municipal public utility rendering only local service to furnish all of its long distance service to a particular municipal public utility rendering that service because such an agreement seemed to the court necessary to secure long distance service for such customers, while other courts, it would seem, with better reason, have insisted that such local customers should not be precluded from the enjoyment of all long distance service that might be or become available and that when the local company undertook to

⁷ This section (§ 552 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

furnish long distance service and the long distance company undertook to accommodate the local customers they thereby relinquished their right to operate independently and subjected their plants respectively to the use of all customers, whether they agreed to use the one long distance company exclusively or to patronize all such companies indiscriminately.

An order of the public service commission regarding the sale of telephone plants and the distribution of territory between the companies interested in making the sale, where the question of future service is involved, will be respected by the court, where it is reasonable and within the jurisdiction of the commission, for as the court said in the case of *In re Northwestern Indiana Tel. Co.*, 201 Ind. 667, 171 N. E. 65, P. U. R. 1930D, 143: "So long as the commission keeps within the field of regulative powers over the persons or entities over which it has jurisdiction, its orders and action with reference to such matters must be respected by the court. The presumption of good faith and valid orders by the commission must obtain until the contrary is made clearly to appear. * * * The theory of the law creating the commission is that it shall be conscientiously and impartially administered by a body composed of a personnel especially qualified by knowledge, training, and experience pertaining to the subject-matter committed to it for award consonant with reasonable fairness and substantial justice according to legislative mandate. * * * A public utility of Indiana, in whatever field engaged, is, by reason of its public quality, pledged to a frugal administration of its business and to furnish adequate service as a matter of public welfare and convenience, for which engagements, if strictly kept, the law forbids competitive service by other public utilities in territory already covered, except between competing companies thus engaged at the time the law became effective, other than the regulation of rates. * * * The commission, acting in a regulatory capacity as between the public and the utilities here interested, is not a necessary party to an appeal, as we shall presently endeavor to show. It must judge of its powers and determine the question of its jurisdiction, and to this extent only may it interpret statutes by giving them what is known as a practical construction as distinguished from a judicial construction, which is strictly a judicial function. After canvassing the proposal submitted by petitioners, the commission disapproved it. * * * So that, whether an appeal was taken by the utilities (petitioners) or by others authorized so to do, the case was triable de novo and summarily

in the court to which the appeal was taken. * * * The ultimate question for determination is whether the order of the commission is reasonable or within its power to make. If not, in either case the court may set it aside. Upon the theory that the court had jurisdiction to render a final judgment and to require the commission to comply therewith, the order of the commission was set aside as being unreasonable and unlawful, and the commission ordered to approve the petition. * * * But by this enactment the legislature has vested it with authority, subject to review by the courts, to supervise or regulate the terms of a sale, in so far only as it affects the public. 'The owner of such property must submit to be controlled by the public to the extent of its interest as long as such public use is maintained.' * * * Petitioners sought an approval by the commission of the sale and purchase of property devoted to a public use. They here attempt to raise the question of jurisdiction by challenging the constitutionality of the statute under which these proceedings were begun. As we have seen, the legislature has expressly given the commission and the courts jurisdiction of the matter involved in the petition, and, inasmuch as the question of jurisdiction as here presented depends upon the invalidity of a statute not in any manner questioned in the court below, where all the relief asked was obtained, they will not be permitted to here question its constitutionality for the first time. * * * The real question before the public service commission, as well as on appeal to the circuit court, was not the right of one telephone company to sell its stock and assets to two other companies engaged in the same business in other territory, but it involved the question of service to be rendered the public in the future by the purchasing companies under the proposed division of territory between them. * * * In conclusion, we hold that all of that part of the judgment of the court below wherein the court substituted its discretion for that of the commission and ordered the commission to adopt it was without the power of the court, and to that extent the judgment below was erroneous."

§ 682. **Contracts for connected or through service.**²—As there seems to be no legal reason for making the distinction between local and long distance telephone service, the decisions holding that where, by virtue of an agreement between the companies furnishing local and long distance service, they are con-

² This section (§ 553 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

nected for the purpose of giving consolidated local and long distance service, this service becomes available to all. It necessarily follows that where by agreement of the companies furnishing local and long distance service respectively to consolidate their service, such service also becomes available to the public generally, and the particular company rendering the long distance service, which is a party to the consolidating contract, is not permitted to deny service to a customer of the local company who may also avail himself of the long distance service rendered by a company in competition with the former one. For if this is not the correct rule a municipal public utility furnishing a service which is public in its nature and a natural monopoly can compel a customer present or prospective to limit his service to the particular company and thereby preclude him from enjoying other similar service that is available, all of which is necessary to furnish him with complete and adequate service.

§ 683. **Physical connection only by contract or state requirement.**⁹—The courts are agreed that in the absence of a contract between competing or connecting companies for the physical connection of their telephone plants or of a constitutional or statutory requirement that such plants be connected for the purpose of exchanging service, such companies can not be required to make a physical connection of their plants by the use of a common switchboard or trunk line between their exchanges, although a few decisions on this point suggest that the power resides in the state to make and enforce such a requirement in the form of a regulation of the service.

Where the commission has no authority to compel the physical connection of telephone plants, and a contract is made between such plants, providing for such connection with the right of withdrawal expressly stipulated in the contract, the commission may not, after such withdrawal, require the plants to be physically connected, as is decided in the case of *Allen v. Railroad Commission*, 202 Wis. 223, 231 N. W. 184: "It is now considered by the railroad commission that there should be established that relation between the companies which the companies may be compelled to establish by order of the commission under the statute. In practical effect the claim of the plaintiffs is that the defendant, having voluntarily entered into the arrangement with the reservation of the right to terminate it and return to its

⁹ This section (§ 554 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-*

Cable Co., 285 Ill. 411, 120 N. E. 795, and *Southwestern Tel. & T. Co. v. State*, 109 Tex. 337, 207 S. W. 308.

former status, should now by action of the railroad commission be irrevocably held there by order of the commission, although in a position which it could not be required to take in the first place by order of the commission. The commission under the statute has no authority to compel the Dekorra Company to re-enter into the relationship created by the contract, it having withdrawn itself from that relationship, and there being no authority in the statute to require it to enter into such a relationship in the first instance. No reason is pointed out for holding the reservation contained in the contract which operated in favor of both parties invalid, and we see none. * * * The contract was approved by the commission, and the Dekorra Company withdrew from the contract in accordance with its terms. It follows therefore that the judgment dismissing the complaint in the action brought to review the order of the railroad commission directing physical connection between the two companies, being case No. 181, should be affirmed."

A decision by the state commission concerning the physical connection of telephone plants that was made without notice to one of the interested companies, which was thereby precluded from having the opportunity of participating in the hearing upon which the order was issued, will be set aside for the reason that all interested companies were entitled to a hearing; and the commission was not fully advised in reaching their decision because one of the interested companies was not notified and did not participate. This principle is established and discussed as follows in the case of *State v. Pacific Tel. & T. Co.*, 144 Wash. 383, 258 Pac. 313, P. U. R. 1927E, 585, where the court said: "Before the department could determine that a necessity existed for a connection between the lines of the Skagit Valley Rural Telephone Company and the Pacific Telephone & Telegraph Company, it would have to determine the extent and character of the service already being rendered by the Puget Sound Telephone Company; and it was impossible for the department to determine the necessity for that connection without hearing proof from all the companies involved in this web of telephone service. The Puget Sound Telephone Company, not being a party, had no opportunity to produce witnesses on its own behalf on the question of necessity or to cross-examine the witnesses produced by its competitors. The Puget Sound Telephone Company, not having been made a party, could not present the testimony regarding its lines, plant, and exchanges, the character of service that was rendered, and the accessibility of that service to all the com-

munities involved, the details of its business and operation; and the department was therefore not fully advised in order to properly decide the question of whether a necessity for further connection existed. * * * The present mandamus action recognized that the Puget Sound Telephone Company was claiming certain exclusive rights to have and maintain connections with the Pacific Telephone & Telegraph Company; this very allegation, disclosing that those rights were never submitted to the department, renders the department decision invalid, the superior court having no jurisdiction to pass upon such rights before they have originally been determined by the department."

§ 684. Classification of telephone service.¹¹—The rule prohibiting discrimination in the service and the rates charged for it, however, is applicable to the furnishing of telephone service to the same extent and for the same reasons that it is applied to the furnishing of service by other municipal public utilities, although this service may be classified as residence or business, single or party line, and with reference to the distance the subscribers are located from the exchange, and different charges may be made for the various classes of service in proportion to the difference in the value of the service or the cost of furnishing it. The classification, however, must be a reasonable one and a different rate can be made only where the value of the service or the cost of furnishing it justifies it, and such a company would not be permitted to distinguish between old and new subscribers as such by requiring a higher rate of all parties who become subscribers after a certain time than parties who are then subscribers are required to pay. Nor can the municipal public utility furnishing telephone service require that its customers use the service of any particular system exclusively because the value of the telephone service and the conditions upon which the franchise is granted permitting such service to be furnished are the facilities which it will afford of communicating with the largest possible number of people. The telephone company will not be permitted to restrict its customers in the enjoyment of this service to its own system. This is a well-established legal principle, although the reason generally assigned for refusing this restriction, that it tends to stifle competition, is being more generally recognized as of doubtful value and con-

¹¹ This section (§ 556 of second ties Comm. v. Postal Telegraph-edition) cited in State Public Utili- Cable Co., 285 Ill. 411, 120 N. E. 795.

sequently the greater necessity for public regulation and control is becoming more generally admitted.¹²

Cases involving radio service also are cited in the following note:

¹² *United States*. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. R. Co.*, 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. 185; *Railroad Comm. v. Cumberland Tel. & T. Co.*, 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. 357; *New York, Philadelphia & C. Tel. Co. v. Dolan*, 265 U. S. 96, 63 L. ed. 916, 44 Sup. Ct. 450; *Pacific Tel. & T. Co. v. Kuykendall*, 265 U. S. 196, 68 L. ed. 975, 44 Sup. Ct. 553; *Home Tel. & T. Co. v. Kuykendall*, 265 U. S. 206, 68 L. ed. 982, 44 Sup. Ct. 557; *Hopkins v. Southern California Tel. Co.*, 275 U. S. 393, 72 L. ed. 329, 48 Sup. Ct. 180; *Denney v. Home Tel. & T. Co.*, 276 U. S. 97, 72 L. ed. 483, 48 Sup. Ct. 223; *New Jersey Bell Tel. Co. v. State Board of Taxes & Assessment*, 280 U. S. 338, 74 L. ed. 463, 50 Sup. Ct. 111; *White v. Johnson*, 282 U. S. 367, 75 L. ed. 388, 51 Sup. Ct. 115; *American Bond & C. Co. v. United States*, 282 U. S. 374, 75 L. ed. 395, 51 Sup. Ct. 118; *Smith v. Illinois Bell Tel. Co.*, 283 U. S. 808, 75 L. ed. 1427, 51 Sup. Ct. 646, P. U. R. 1931A, 1.

Federal. Billings Mut. Tel. Co. v. Rocky Mountain Bell Tel. Co., 155 Fed. 207; *United States Tel. Co. v. Central Union Tel. Co.*, 171 Fed. 130, *affd.* in 202 Fed. 66; *Pacific Tel. & T. Co. v. Anderson*, 196 Fed. 699; *Pacific Tel. & T. Co. v. Wright-Dickinson Hotel Co.*, 214 Fed. 666; *Memphis Tel. Co. v. Cumberland Tel. & T. Co.*, 231 Fed. 835, P. U. R. 1916E, 305; *Southern Bell Tel. & T. Co. v. Railroad Comm. of Georgia*, 274 Fed. 438, P. U. R. 1922A, 419, *cert. denied* in 262 U. S. 761, 67 L. ed. 1220, 43 Sup. Ct. 521; *Southern Bell Tel. Co. v. Railroad Comm. of South Carolina*, 299 Fed. 615; *Indiana Bell Tel. Co. v. Public Service Comm. of Indiana*, 300 Fed. 190; *New York Tel. Co. v. Prendergast*, 300 Fed. 822; *State of Washington v. Pacific Tel. Co.*, 1 Fed. (2d) 327; *Pacific Tel. Co. v. Star Pub. Co.*, 5 Fed. (2d) 151; *Pacific Tel. & T. Co. v. Agnew*, 5 Fed. (2d) 221; *Ohio Bell Tel. Co. v.*

Public Utilities Comm. of Ohio, 3 Fed. (2d) 701; *Chesapeake & Potomac Tel. Co. v. Whitman*, 3 Fed. (2d) 938; *Southern Bell Tel. & T. Co. v. Railroad Comm. of South Carolina*, 5 Fed. (2d) 77, P. U. R. 1926A, 6; *New York Tel. Co. v. Board of Public Utility Comrs.*, 5 Fed. (2d) 245, *affd.* in 271 U. S. 23, 70 L. ed. 808, 46 Sup. Ct. 363; *Northwestern Bell Tel. Co. v. Spillman*, 6 Fed. (2d) 663, P. U. R. 1926A, 330; *United States v. Zenith Radio Corp.*, 12 Fed. (2d) 614; *Pacific Tel. & T. Co. v. Seattle, Washington*, 14 Fed. (2d) 877; *White v. Federal Radio Comm.*, 29 Fed. (2d) 113; *United States v. American Bond & C. Co.*, 31 Fed. (2d) 448, *affd.* in 52 Fed. (2d) 318, P. U. R. 1932A, 522; *General Elec. Co. v. Federal Radio Comm.*, 31 Fed. (2d) 630, P. U. R. 1929D, 321, *writ of cert. denied* in 281 U. S. 464, 74 L. ed. 969, 50 Sup. Ct. 389; *Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co.*, 33 Fed. (2d) 770, P. U. R. 1929E, 260, *affd.* in 45 Fed. (2d) 995, P. U. R. 1931B, 401; *Richmond Development Corp. v. Federal Radio Comm.*, 35 Fed. (2d) 883; *New York Tel. Co. v. Prendergast*, 36 Fed. (2d) 54, P. U. R. 1930B, 33; *Technical Radio Laboratory v. Federal Radio Comm.*, 36 Fed. (2d) 111; *New York, New York v. Federal Radio Comm.*, 36 Fed. (2d) 115, 59 App. D. C. 129; *Carrell v. Federal Radio Comm.*, 36 Fed. (2d) 117; *Great Lakes Broadcasting Co. v. Federal Radio Comm.*, 37 Fed. (2d) 993; *Illinois Bell Tel. Co. v. Moynihan*, 38 Fed. (2d) 77, P. U. R. 1930B, 148, *mod. and remanded* in *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 75 L. ed. 255, 51 Sup. Ct. 65; *Batesville Tel. Co. v. Public Service Comm. of Indiana*, 46 Fed. (2d) 226, *app. dis.* — U. S. —, 76 L. ed. 33, 52 Sup. Ct. 1; *Illinois Bell Tel. Co. v. Smith*, 39 Fed. (2d) 157; *Chicago Federation of Labor v. Federal Radio Comm.*, 41 Fed. (2d) 422; *Michigan Bell Tel. Co. v. O'Dell*, 45

Fed. (2d) 180, P. U. R. 1931B, 192; Havens v. Federal Radio Comm., 45 Fed. (2d) 295, 59 App. D. C. 393; Saltzman v. Stromberg-Carlson Tel. Mfg. Co., 46 Fed. (2d) 612; Courier-Journal Co. v. Federal Radio Comm., 46 Fed. (2d) 614; General Broadcasting System v. Federal Radio Comm., 47 Fed. (2d) 426; Marquette University v. Federal Radio Comm., 47 Fed. (2d) 406; Westinghouse Elec. &c. Co. v. Federal Radio Comm., 47 Fed. (2d) 415; Florida Tel. Corp. v. Florida Railroad Comm., 47 Fed. (2d) 467, P. U. R. 1931C, 119; KFKB Broadcasting Assn. v. Federal Radio Comm., 47 Fed. (2d) 670; Duncan v. United States, 48 Fed. (2d) 128, cert. denied in 283 U. S. 863, 75 L. ed. 1468, 51 Sup. Ct. 656; Reading Broadcasting Co. v. Federal Radio Comm., 48 Fed. (2d) 458; Journal Co. v. Federal Radio Comm., 48 Fed. (2d) 461; General Broadcasting System v. Bridgeport Broadcasting Station, 53 Fed. (2d) 664; Sproul v. Federal Radio Comm., 54 Fed. (2d) 444; Riker v. Federal Radio Comm., 55 Fed. (2d) 535; Durham Life Ins. Co. v. Federal Radio Comm., 55 Fed. (2d) 537; Pacific-Development Radio Co. v. Federal Radio Comm., 55 Fed. (2d) 540; United States v. Molyneaux, 55 Fed. (2d) 912; WHB Broadcasting Co. v. Federal Radio Comm., 56 Fed. (2d) 311; Woodman of the World Life Ins. Assn. v. Federal Radio Comm., 57 Fed. (2d) 420; Strawbridge (Station WFI) v. Federal Radio Comm., 57 Fed. (2d) 434; Michigan Bell Tel. Co. v. Michigan Public Utilities Comm., — Fed. (2d) —, P. U. R. 1931E, 222; Columbus Gas &c. Co. v. Columbus, Ohio, 55 Fed. (2d) 56, P. U. R. 1932B, 4; Western Distributing Co. v. Public Service Comm., 58 Fed. (2d) 241.

Alabama. South Central Tel. Co. v. Corr, 220 Ala. 127, 124 So. 294.

California. Pacific Tel. & T. Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; California Fireproof Storage Co. v. Brundige, 199 Cal. 185, 248 Pac. 669, P. U. R.

1926E, 852; People v. Turlock Home Tel. & T. Co., 200 Cal. 546, 253 Pac. 1108; People v. Orange County Farmers &c. Assn., 56 Cal. App. 205, 204 Pac. 873.

Delaware. Diamond State Tel. Co. v. Maclary (Del.), 156 Atl. 223.

Florida. State v. Western Union Tel. Co., 96 Fla. 392, 118 So. 478, P. U. R. 1929A, 252.

Illinois. Western Union Tel. Co. v. Chicago &c. R. Co., 86 Ill. 246, 29 Am. Rep. 28; Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324, 65 N. E. 329; Union Trust &c. Bank v. Kinlock Long Distance Tel. Co., 258 Ill. 202, 101 N. E. 535, 45 L. R. A. (N. S.) 465, Ann. Cas. 1914B, 258; State Public Utilities Comm. v. Noble Mut. Tel. Co., 268 Ill. 411, 109 N. E. 298, Ann. Cas. 1916D, 897, P. U. R. 1915D, 770; Public Utilities Comm. v. Bethany Mutual Tel. Co., 270 Ill. 183, 110 N. E. 334, Ann. Cas. 1917B, 495; Public Utilities Comm. v. Noble, 275 Ill. 121, 113 N. E. 910; Public Utilities Comm. v. Okaw Valley Mutual Tel. Assn., 282 Ill. 336, 118 N. E. 760; State Public Utilities Comm. v. Postal Tel.-Cable Co., 285 Ill. 411, 120 N. E. 795, P. U. R. 1919B, 142; Palmyra Tel. Co. v. Modesto Tel. Co., 336 Ill. 158, 167 N. E. 860, P. U. R. 1930A, 295.

Indiana. Central Union Tel. Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. 114; State v. Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; Northern Indiana & Southern Michigan Tel. &c. Co. v. Peoples Mut. Tel. Co., 187 Ind. 486, 119 N. E. 212, P. U. R. 1918D, 548; In re Northwestern Indiana Tel. Co., 201 Ind. 667, 171 N. E. 65, P. U. R. 1930D, 143; Home Tel. Co. v. North Manchester Tel. Co., 47 Ind. App. 411, 92 N. E. 558; Van Ausdall v. Indiana Bell Tel. Co., 84 Ind. App. 257, 151 N. E. 19, P. U. R. 1927A, 389.

Iowa. Cherokee v. Northwestern Bell Tel. Co., 199 Iowa 727, 202 N. W. 886; State v. Northwestern Bell Tel. Co. (Iowa), 240 N. W. 252.

Kansas. Baxter Tel. Co. v. Cherokee County Mutual Tel. Co., 94 Kans.

159, 146 Pac. 324; Clay County Co-Op. Tel. Assn. v. Southwestern Bell Tel. Co., 107 Kans. 169, 190 Pac. 747, 11 A. L. R. 1193, P. U. R. 1920F, 251; State v. Southwestern Bell Tel. Co., 115 Kans. 236, 222 Pac. 771, P. U. R. 1924D, 388; State v. Missouri, Kansas & C. R. Co., 117 Kans. 651, 232 Pac. 1038.

Kentucky. Campbellsville Tel. Co. v. Lebanon & C. Tel. Co., 118 Ky. 277, 26 Ky. L. 127, 80 S. W. 1114, 84 S. W. 518; Cumberland Tel. & T. Co. v. Brandon, 154 Ky. 644, 157 S. W. 1119; Eastern Kentucky Home Tel. Co. v. Dempster Constr. Co., 217 Ky. 762, 290 S. W. 684; Northern Kentucky Mutual Tel. Co. v. Bracken County, 220 Ky. 297, 295 S. W. 146; Groover v. Irvine, 222 Ky. 366, 300 S. W. 904; Hardin County Kentucky Tel. Co. v. Elizabethtown, 227 Ky. 778, 14 S. W. (2d) 162; Campbellsville v. Taylor County Tel. Co., 229 Ky. 843, 18 S. W. (2d) 305, P. U. R. 1929D, 547; Norris v. Kentucky State Tel. Co., 235 Ky. 234, 30 S. W. (2d) 960; Railroad Commission v. Northern Kentucky Tel. Co., 236 Ky. 747, 33 S. W. (2d) 676, P. U. R. 1931B, 254; Hodgenville v. Gainesboro Tel. Co., 237 Ky. 419, 35 S. W. (2d) 888; Cumberland Tel. & T. Co. v. Cartwright Creek Tel. Co., 32 Ky. L. 1357, 108 S. W. 875.

Maine. Gilman v. Somerset Farmers Co-operative Tel. Co., 129 Maine 243, 151 Atl. 440.

Maryland. Baldwin v. West, 160 Md. 202, 152 Atl. 907; Chesapeake & Potomac Tel. Co. v. Tyson, 160 Md. 298, 153 Atl. 271.

Massachusetts. New England Tel. Co. v. Department of Public Utilities, 262 Mass. 137, 159 N. E. 743, P. U. R. 1928B, 396; Mentzer v. New England Tel. & T. Co. (Mass.), 177 N. E. 549.

Michigan. Mahan v. Michigan Tel. Co., 132 Mich. 242, 93 N. W. 629; Bradford v. Citizens Tel. Co., 161 Mich. 385, 126 N. W. 444, 137 Am. St. 513; Michigan State Tel. Co. v. Michigan Railroad Comm., 193 Mich. 515, 161 N. W. 240, P. U. R. 1917C, 355; Michigan Public Utili-

ties Comm. v. Michigan State Tel. Co., 228 Mich. 658, 200 N. W. 749; Mueller Furniture Co. v. Citizens Tel. Co., 230 Mich. 173, 203 N. W. 129; People v. Michigan Bell Tel. Co., 246 Mich. 198, 224 N. W. 438, P. U. R. 1929B, 455.

Minnesota. In re Northwestern Bell Tel. Co., 164 Minn. 279, 204 N. W. 873.

Mississippi. Cumberland Tel. & T. Co. v. State, 100 Miss. 102, 54 So. 670, 39 L. R. A. (N. S.) 277; Postal Tel.-Cable Co. v. Miller, 155 Miss. 522, 124 So. 434.

Missouri. Home Tel. Co. v. Sarcoux Light & C. Co., 236 Mo. 114, 129 S. W. 108, 141 S. W. 845, 36 L. R. A. (N. S.) 124; State v. Public Service Comm., 272 Mo. 637, 199 S. W. 962; Bess v. Citizens Tel. Co., 315 Mo. 1056, 237 S. W. 466; State v. Public Service Comm., 317 Mo. 815, 296 S. W. 790; State v. Brown, 323 Mo. 818, 19 S. W. (2d) 1048, P. U. R. 1930A, 160; Johnstown Tel. Co. v. Berkebile (Mo.), 283 S. W. 456, P. U. R. 1927A, 406; State v. Public Service Comm. (Mo.), 36 S. W. (2d) 947, P. U. R. 1931C, 463; Rose v. Missouri Dist. Tel. Co. (Mo.), 43 S. W. (2d) 562.

Nebraska. State v. Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 25 Am. Rep. 404; Hooper Tel. Co. v. Nebraska Tel. Co., 96 Nebr. 245, 147 N. W. 674; Blackledge v. Farmers Independent Tel. Co., 105 Nebr. 713, 181 N. W. 709, 16 A. L. R. 343, P. U. R. 1921C, 668; Farmers & Merchants Tel. Co. v. Orleans Community Club, 116 Nebr. 633, 218 N. W. 583, P. U. R. 1928E, 787; Lincoln Tel. & T. Co. v. Barth (Nebr.), 240 N. W. 318.

New Jersey. Bannon v. Board of Public Utility Comrs. (N. J. L.), 154 Atl. 402, P. U. R. 1931E, 91; Laurel Garden Corp. v. New Jersey Bell Tel. Co. (N. J.), 160 Atl. 549.

New York. Central New York Tel. & T. Co. v. Averill, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. 878.

North Carolina. Clinton-Dunn Tel. Co. v. Carolina Tel. & T. Co.,

159 N. Car. 9, 74 S. E. 636; Horton v. Interstate Tel. & T. Co. (N. Car.), 163 S. E. 694.

Ohio. Ashley Tri-County Mutual Tel. Co. v. New Ashley Tel. Co., 92 Ohio St. 336, 110 N. E. 959; Shafor v. Public Utilities Comm., 94 Ohio St. 230, 113 N. E. 809, L. R. A. 1917E, 1080, P. U. R. 1916F, 432; Lindsey v. Public Utilities Comm., 111 Ohio St. 6, 144 N. E. 729; Cincinnati v. Public Utilities Comm., 113 Ohio St. 259, 148 N. E. 817; Portsmouth Home Tel. Co. v. Public Utilities Comm., 120 Ohio St. 12, 165 N. E. 354, P. U. R. 1929C, 654; Beaver Tel. Co. v. Public Utility Comm., 121 Ohio St. 533, 170 N. E. 173, P. U. R. 1930C, 277.

Oklahoma. Pioneer Tel. & T. Co. v. State, 38 Okla. 554, 134 Pac. 398; Pioneer Tel. & T. Co. v. State, 45 Okla. 31, 144 Pac. 1060; Pioneer Tel. & T. Co. v. State, 71 Okla. 305, 177 Pac. 580, P. U. R. 1919C, 554; Pioneer Tel. & T. Co. v. State, 77 Okla. 216, 186 Pac. 934, P. U. R. 1920C, 557; Pioneer Tel. & T. Co. v. State, 78 Okla. 38, 188 Pac. 107, P. U. R. 1920D, 382; Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co., 143 Okla. 76, 291 Pac. 3, P. U. R. 1930D, 400; Pioneer Tel. & T. Co. v. Grant County Rural Tel. Co. (Okla.), 119 Pac. 968.

Oregon. Yamhill Elec. Co. v. McMinnville, 130 Ore. 309, 274 Pac. 118, 280 Pac. 504, P. U. R. 1929C, 346.

Pennsylvania. Mitchell v. Public Service Comm., 276 Pa. 390, 120 Atl. 447, P. U. R. 1924A, 521; Erie v. Public Service Comm. (Pa.), 157 Atl. 809; Bell Tel. Co. v. Public Service Comm. (Pa.), 158 Atl. 186.

South Carolina. Gwynn v. Citizens Tel. Co., 69 S. Car. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. 819; Matheson v. American Tel. & T. Co., 137 S. Car. 227, 135 S. E. 306; Brunson v. South Carolina Cooperative Tel. Co. (S. Car.), 159 S. E. 913, P. U. R. 1931E, 428.

South Dakota. Milbank v. Dakota Central Tel. Co., 37 S. Dak. 504, 159 N. W. 99, P. U. R. 1916F, 562; Southwest Branch of Rural Recipro-

cal Tel. Co. v. Dakota Central Tel. Co., 53 S. Dak. 121, 220 N. W. 475.

Tennessee. Home Tel. Co. v. Peoples Tel. & T. Co., 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550; McCollum v. Southern Bell Tel. & T. Co., 163 Tenn. 277, 43 S. W. (2d) 390, P. U. R. 1932A, 462; Williams v. Southern Bell Tel. & T. Co. (Tenn.), 47 S. W. (2d) 758.

Texas. Fink v. Clarendon (Tex.), 282 S. W. 912; West Texas Utilities Co. v. Haynes (Tex.), 20 S. W. (2d) 236; Goose Creek v. Hunnicutt (Tex.), 39 S. W. (2d) 617; Southwestern Tel. & T. Co. v. State (Tex. Civ. App.), 150 S. W. 604, affd. in 109 Tex. 337, 207 S. W. 308, P. U. R. 1919C, 56.

Utah. Logan City v. Public Utilities Comm. (Utah), 296 Pac. 1006, P. U. R. 1931C, 5.

Virginia. Commonwealth v. Staunton Mutual Tel. Co., 134 Va. 291, 114 S. E. 600, P. U. R. 1923B, 198; Chesapeake & Potomac Tel. Co. v. Wythe Mutual Tel. Co., 142 Va. 529, 129 S. E. 389; Chesapeake & Potomac Tel. Co. v. Commonwealth, 147 Va. 43, 136 S. E. 575, P. U. R. 1927B, 484.

Washington. State v. Skagit River Tel. & T. Co., 85 Wash. 29, 147 Pac. 885, 151 Pac. 1122, mod. in 151 Pac. 1122, and on second rehearing in 89 Wash. 625, 155 Pac. 144; State v. Kuykendall, 134 Wash. 620, 236 Pac. 99, P. U. R. 1926A, 103; State v. Pacific Tel. & T. Co., 144 Wash. 383, 258 Pac. 313, P. U. R. 1927E, 585; Columbia River Tel. Co. v. Department of Public Works, 148 Wash. 395, 269 Pac. 6, P. U. R. 1928E, 520; State v. Baker (Wash.), 2 Pac. (2d) 1099, P. U. R. 1931E, 482.

West Virginia. Huntington v. Public Service Comm., 101 W. Va. 378, 133 S. E. 144, P. U. R. 1926D, 835; Blue Field Tel. Co. v. Public Service Comm., 102 W. Va. 296, 135 S. E. 833.

Wisconsin. Wisconsin Tel. Co. v. Railroad Commission, 162 Wis. 383, 156 N. W. 614, L. R. A. 1916E, 748, P. U. R. 1916D, 212; Commonwealth

§ 685. Physical connection by constitutional provision.¹³—

The giving of telephone service is recognized as being public in its nature and an actual necessity to modern business methods, so that the municipal public utility undertaking to furnish such service is obliged to serve all who apply and are willing to pay for it under such reasonable rules and regulations as may be required. The value of the service depends directly upon the number of subscribers to the service who may be reached by it, and where there are two or more telephone companies in the same locality, complete service can only be had by a physical connection of the different plants or the use of a common switchboard, unless every subscriber for telephone service is a customer of each of the plants in the locality which furnishes such service. To avoid the expense and inconvenience of requiring every party who desires the telephone to contract with all the companies which have undertaken to furnish it, in order to secure complete service, a few of the states by way of regulating the furnishing of such service by virtue of a constitutional provision require the physical connection of the different telephone systems and the exchange of service between their subscribers so that a subscriber to either company may reach all the subscribers of that or any other company available in the particular locality, which is a convenience to which they are entitled under the constitution of the state of Montana, for as the court in the case of *Billings Mut. Tel. Co. v. Rocky Mountain Bell Tel. Co.*, 155 Fed. 207, decided in 1907, said: "It is clear that plaintiff has a right, under the constitution of the state [section 14, article 15], to connect its telephone line with defendant's. * * * I think that the use that may be acquired by the plaintiff company is such as is practicable by a connection like that had in the every day service with defendant's own connections. This is feasible by a plan of trunking between the exchanges, where the respective switch or toll boards are maintained. The defendant company would then receive the business from the plaintiff as it now receives business coming from one of its own subscribers. * * * In other words, where two companies owning different lines of telephones in Montana can not agree upon the compensa-

Tel. Co. v. Carley, 192 Wis. 464, 213 N. W. 469, P. U. R. 1927C, 164; *Allen v. Railroad Commission*, 202 Wis. 223, 231 N. W. 184; *Hotel Pfister v. Wisconsin Tel. Co. (Wis.)*, 233 N. W. 617; *Union Cooperative*

Tel. Co. v. Public Service Comm. (Wis.), 239 N. W. 409.

¹³ This section (§ 557 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

tion for the privilege of connection and use, the law of Montana obliges the one to submit to connection with the other, and [upon payment of damages to be assessed], to accept a patronage, and to submit to a necessary use that it might not wish to accept or allow, and probably could not be compelled to accept or allow, were it not for the provisions of the constitution and laws of the state."

Construing the constitutional provisions providing for the physical connection of telephone plants, the court, in the case of *Pioneer Tel. & T. Co. v. State*, 71 Okla. 305, 177 Pac. 580, P. U. R. 1919C, 554, said: "The language of the constitution requiring a physical connection of the lines is mandatory; but it follows, naturally, that such connection must be made so as not to destroy property rights and so as to be reasonable and just to both companies. The right of one telephone company to connect its lines with that of another company implies no more than a mechanical union of the lines, so as to admit of the convenient passage of messages from one to the other, and does not include the right to compel business intercourse between two competing companies to the detriment of either company. The lines are to be connected, not the companies, and the purpose is to establish and maintain means for a continuous transmission of messages for the benefit and convenience of the public. It was never intended by this section to compel two companies, competing for the same business, to make such physical connection between their lines and exchanges as would permit one company to have the benefit and use of the equipment and system of the other, to its detriment and the discrimination of its subscribers. On the contrary, it was meant to require such a mechanical union of the lines as would constitute a continuous transmission of the messages for the public convenience, and without destroying the property rights of either company. A connection, under rules and regulations that amount to the destruction of property, or that work a discrimination against the subscribers of either exchange, would amount to the taking of the property without due process of law."

An interesting discussion of the right rather than the obligation of telephone companies to make physical connections of their plants or facilities is furnished in the case of *State v. Northwestern Bell Tel. Co.* (Iowa), 240 N. W. 252, where the court said: "The duty of appellant to furnish equal facilities to the public, independent of statute or of some other understanding or agreement, applies only to its subscribers and per-

sons or corporations desiring, upon usual terms, to avail themselves thereof. The majority rule preserves the right of private contract, and under it one telephone company may make physical connection with a second without being bound to enter into a similar arrangement with a third. * * * We think it clear that appellant does not hold itself out as offering facilities to other similar corporations or persons so engaged as a part of its duty to the public. That it might do so and thereby dedicate its property and facilities to the public in such sense that it might be estopped from severing physical connection with some other utility or otherwise prevented from doing so may probably be conceded. No such question is involved or before us. We are persuaded that the majority rule is supported by the better reasoning; therefore, hold that the relief sought in this action is not available under any rule of the common law or voluntary act of appellant. * * * The statute recognizes the presence of connecting lines, but, when given its most liberal construction, we find nothing therein which makes it obligatory upon one telephone company to physically connect its facilities with another. If they do effect physical connection, they are bound to furnish equal facilities to all."

Where there is no contract and no order of the state commission requiring the physical connection of telephone plants, and the public interest is not affected, the court will not require one telephone company to submit to a connection with a competing company against its will. Where the public interest is not involved, because adequate service is available without such a connection, the court will not require it for the sole benefit of the competing company. In establishing this principle, and in holding that under such conditions, the question is one entirely of contract, the court in the case of *Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co.*, 33 Fed. (2d) 770, P. U. R. 1929E, 260, spoke as follows: "At the present time, a physical connection of the two telephone systems at Poteau exists under the rules, regulations and requirements of the Oklahoma corporation commission, fixing the terms of said connection and the compensation to be received by each party. * * * From the record it is disclosed that the Bell Company has physical connection with two telephone companies operating in small towns near Ft. Smith. These connections are maintained under contracts similar in terms to the 1923 contract with plaintiff, having a provision for their termination upon thirty days' notice. * * *

The Poteau Company by this suit seeks by injunction a recon-

nection of its long-distance lines with the Bell Company's exchange at Ft. Smith, a restoration of the physical connections between the two companies as they existed under the terms of the contract of 1923. * * * The record shows that the public are not materially inconvenienced by the failure to maintain a physical connection of the two telephone systems at Ft. Smith. This is certainly true, if the order of the Oklahoma corporation commission is carried into effect. Under existing conditions all calls are transmitted over the Bell Company's line, with equal, if not better, transmission facilities than the Poteau Company's line affords. The delay, if any, occasioned by the mode of handling messages at Poteau would be entirely removed by plaintiff's complying with the terms and conditions of the order of the Oklahoma corporation commission, which this court regards as just and equitable. This being true, it is difficult to see how the public is in any way interested in this controversy. This then removes from the case all questions of law with reference to the regulation and control of public utilities in their relation to the public, the controlling factor in almost all of the cases cited by both plaintiff and defendant. When the public interest is removed from the case, entirely different principles of law determine the conclusion that should be reached. Public necessity and convenience require public utilities to do many things which private individuals or companies can not require. In my opinion, this controversy resolves itself into one between the two telephone companies competing for the long-distance business passing through both Poteau and Ft. Smith, at least that part of it which prior to the termination of the contract of 1923 was handled by plaintiff. In such a case the principles of law governing the making of contracts between private individuals are applicable. One telephone company can not, where the public interest is not affected, compel a connection with its competitor solely upon the ground that a failure to obtain such a connection will cause it loss. This is the plaintiff's contention. * * * The result of granting the relief prayed for would be to establish two competing toll lines between Poteau and Ft. Smith, and in that way take from two to five hundred dollars per month from the defendant and give it to the plaintiff. The fact that the failure to grant the relief asked destroys to a large extent the value of the long-distance line of the plaintiff does not entitle it to compel a connection with the defendant. This hazard it should have considered when it constructed the line. When the public interest is not affected, its right to use the defendant com-

pany's property is one entirely of contract. Besides, the public ought not to be required to maintain two long-distance lines between Ft. Smith and Poteau, when one line affords all the telephone facilities needed. If the tolls now charged are too high, ample legislative authority exists for regulating them. * * * The contention that the defendant has surrendered the independent use of its property by contracting with the plaintiff to use it as a part of a public utility is sound only when the facts justify the holding that the failure to continue to so use it will inconvenience the public. The reason for the rule, if it exists at all, is that the public would be inconvenienced by the failure to continue the contracted use of the property, and, when the reason fails, the rule no longer applies. * * * This suit is not to prevent the breach of an existing contract, but to compel a connection without a contract, and without an order of a regulatory body requiring a connection. If it were the law that a defendant having granted a connection to other companies must upon the same terms extend a like service to the plaintiff, the facts show that the defendant originally had a similar contract with the plaintiff, the termination of which was brought about by the failure of the plaintiff to comply with its terms. The sole purpose of this suit is to require the defendant to permit the use of its telephone facilities by a competitor. The convenience of the public is in no way affected. Under these conditions, it is fundamental that the relief can not be granted."

§ 686. Statutory and constitutional requirements upheld.¹⁴—That a similar regulation is made of municipal public utilities undertaking to render telephone service in the state of Kentucky, by virtue of a constitutional provision of that state, is indicated by the case of *Campbellsville Tel. Co. v. Lebanon, &c. Tel. Co.*, 118 Ky. 277, 26 Ky. L. 127, 80 S. W. 1114, 84 S. W. 518, decided in 1904, where the court sustained an action in mandamus to compel the defendant company to receive messages over its wires, which connected with those of the plaintiff, by virtue of an agreement between them to that effect which was also required of them by virtue of the constitutional provision so long as they maintained their telephone systems and operated their exchanges, for as the court said: "In addition, all telephone companies operating exchanges in different towns or cities in this state are required by the constitution of this commonwealth to receive and transmit messages between their users. * * *

¹⁴ This section (§ 558 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

The section of the constitution implies that such connections shall not only be made, and the service allowed, but that they shall be maintained and continued. * * * We conclude that this contract was not determinable at the will of either of the parties to it, but that it must continue during the corporate existence of the two companies."

Wisconsin has statutory provisions for physical connection between telephone lines to be made under the direction of the railway commission.¹⁵ Physical connection of continuous telephone lines for through service may be had under statutory provisions in Indiana.¹⁶

In denying the right of one telephone company to physical connection with another, by which the court held the former secured long-distance service for its patrons without making compensation therefor, which accordingly constituted the taking of property without compensation, the Supreme Court of California, construing for the first time this phase of their Public Utilities Act in the case of *Pacific Tel. & T. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, decided in 1913, said: "It would undoubtedly, as the commission finds, be a great public convenience, and there was great public need for long-distance service on behalf of the subscribers of the Glenn and Tehama county companies who did not have the advantage of the long-distance service of the other company. But no necessity, however urgent, justifies a taking of property without compensation. * * * It would appear, therefore, that it is not the necessities of the public, but the necessities of and benefits to the rival companies, which have prompted an order devoting the property of the Pacific company to the uses of the rival companies. * * * There can be no escape then from the conclusion that the order here before us involves a taking of the property within the meaning of the constitution, and that the taking, without regard to the authority of the commissioners to exercise the power of eminent domain, is a taking without compensation, respondent itself insisting upon this view of the case, saying: 'The commission has at no time contended or admitted that any compensation is due petitioner for a taking of its property. The compensation referred to is compensation to be paid to petitioner for services rendered in receiving and transmitting long-distance telephone messages.' It, therefore,

¹⁵ Wisconsin Stat. 1931, § 196.04. Deering's California Gen. Laws

¹⁶ Burns' Indiana Stat. 1926, 1931, Act 6386, § 40.

§ 12679. To the same effect, see

stands admitted, as indeed it must, that for the taking no compensation whatsoever is made. * * * But while the compensatory award in such cases rests with the railroad commission, it is still the duty of that commission to make compensation for such a taking."

By statutory provision the state may require physical connections to be made between telephone plants if feasible and necessary and provided proper payment be made in doing so, as the court said in the case of *Wisconsin Tel. Co. v. Railroad Commission*, 162 Wis. 383, 156 N. W. 614, L. R. A. 1916E, 748, P. U. R. 1916D, 212: "Three conditions must coexist before a physical connection is required: Public necessity and convenience must demand the connection; such connection must not result in irreparable injury to the owners or users of the facilities of the companies that would be affected; and the connection must not result in substantial detriment to the service. * * * It will be observed that the commission takes the position that the physical connection desired could be made without taking the plaintiff's property in the constitutional sense and without detriment to it. There is evidence pro and con as to the effect of such connection. It is necessarily opinion evidence, and in the absence of testimony showing the effect of operation under the order, it is impossible to say that the commission is not right. Its judgment is that the extra charge provided for will deter present subscribers to the local exchange of the plaintiff from discontinuing the use of the Bell phone and substituting that of the local company. The correctness of this judgment should be subjected to the acid test of experience before it is condemned. * * * The situation presented is such that it is difficult to see how substantial loss would result to one utility in case a connection was ordered, without resulting in a corresponding benefit to the other. If such other is benefited, it should in all fairness be required to pay. It is hardly conceivable that the legislature had a purpose in mind to discriminate against public utilities by taking away the business of one without any compensation and handing it over to the other if we were to concede for the moment that it might do so. Public convenience and necessity might possibly be promoted by entirely doing away with the local exchange business of the plaintiff, assuming that this could lawfully be accomplished. But such convenience and necessity does not require that its business be in effect handed over as a gift to its rival. If the right exists to do away with this asset, then the right exists to compel the beneficiary to pay for it. Both com-

panies are in La Crosse because the people through their representatives granted them franchises. The inconvenience of having two local telephone systems in a city is obvious to any one familiar with their operation. Assuming that efficient regulation can be had duplication can not be justified from any economic standpoint, and the legislature has recognized this fact in the law under consideration. * * * Instead of damage resulting from the connection ordered, it would be more reasonable to suppose that both profit and convenience would result therefrom. We do not see how the switchboard connection required can entail any substantial loss upon the plaintiff. If it should be conceded that there was a taking of plaintiff's property by either of the requirements referred to, it is a technical taking that results in no loss and it is entirely within the legitimate scope of the police power. The legislature has seen fit to exercise such power, provided no substantial loss would result. The authorities we deem to be quite conclusive on this point."

To the same effect, where such connections will serve the public interests it may be required, is decided in the case of *Commonwealth v. Staunton Mutual Tel. Co.*, 134 Va. 291, 114 S. E. 600, P. U. R. 1923B, 198: "Upon the record it is clear that the public interests demand that the two companies be compelled to make a physical connection upon terms fair and just to both. * * * The statute directs the commission, in requiring the physical connection of two companies, to have regard to the interests of the companies to be affected thereby, as well as the effect upon their ability to render the best service to the public."

That such connections between telephone plants is not a "taking of property" for which payment is required by the constitution is the effect of the decision in the case of *Southwestern Tel. & T. Co. v. State*, 109 Tex. 337, 207 S. W. 308, P. U. R. 1919C, 56: "In our opinion compliance with the order will not result in any 'taking' of the company's property in any constitutional sense. Its effect is only to require that by means of the connection upon its switchboard it affords, for compensation, the service of its toll lines to the public at certain points upon the Paducah Company's line. In all such cases those patrons will be as fully its patrons as those of the Paducah Company. In extending the service it will remain in undisputed control of all of its property, including the switchboard. The operation of its lines for the purpose of the service will be entirely in its hands. No different use or burden will be imposed upon its property. The company is merely made to provide a facility whereby patrons of

another line may, by means of that line and for a charge paid the company for the service, have access to its toll lines. If this be a 'taking' of the company's property, the property of such a company is likewise taken every time the company is made to connect its lines with the storehouse or residence of a local subscriber as the means of affording him similar service. It is not a taking of property. It is merely a reasonable regulation of the company's service for the public convenience which the state may prescribe in the exercise of its police power, and to which the company as a common carrier is properly subject. The regulation does not differ in principle, manner or degree from those requirements found in the statutes of every state which compel the physical connection of different railway lines at junction points, and their acceptance, interchangeably, of traffic from each other. * * * The cases which relate to legislative acts requiring the connection of telephone lines are not numerous, but the following authorities may be referred to as sustaining such exercise of the legislative authority: Pond on Public Utilities, section 554; Jones on Telegraph & Telephone Companies, section 263; Pacific Telephone & Telegraph Co. v. Hotel Co. (D. C.), 214 Fed. 666; Hooper Telephone Co. v. Nebraska Tel. Co., 96 Nebr. 245, 147 N. W. 674."

To the same effect the court in the case of Milbank v. Dakota Central Tel. Co., 37 S. Dak. 504, 159 N. W. 99, P. U. R. 1916F, 562, said: "We are satisfied that the connecting of telephone exchanges, in order to facilitate the transmission of messages, and therefore advance the purpose for which the public service franchises are granted, is not an exercise of the power of eminent domain, but is entirely analogous to the power exercised by a railroad commission in ordering connecting switches between competing lines of railway; that, instead of being an exercise of power of eminent domain, it is a mere regulation of a public service corporation, if not under an implied power resulting from the nature of the franchise enjoyed by the corporation, then under the police powers of the state."

Acting under proper authority, an order, providing for through service by the physical connection of telephone plants and determining the proper division of the expense for such service, including the necessary switching service, will be sustained, especially where it appears that there was no abuse of discretion in making the order, and that it was demanded by public convenience and necessity, for as the court said in the case of Southwest Branch of Rural Reciprocal Tel. Co. v. Dakota Cen-

tral Tel. Co., 53 S. Dak. 121, 220 N. W. 475: "The evident purpose of the statute is the securing of telephone service for the public. The law requires the applicant seeking connection and switching service to bring its lines to the corporate limits of the city or town in which the exchange is situated. These lines must also be properly constructed and in proper condition to be connected up. The record in this case shows that the applicant association has constructed several miles of line on each of the ends prepared for connection between the phone of its nearest subscriber and the corporate limits. We can not say that the board abused its discretion in requiring the petitioners to bear the entire cost of meeting the applicant's lines at the corporate limits. * * * This falls far short of proving that the enforcement of the order will cause an actual loss to the petitioners. * * * The board was fully justified in making this deduction from the evidence and in finding the record insufficient to show that compliance with the order would result in a loss to either of the petitioners. * * * The board having found that public convenience and necessity require, and public service demands, that the lines be connected and there being ample evidence in the record to support that finding, and the record failing to show that the board proceeded irregularly or exceeded its jurisdiction in making the order involved herein, the said order and the proceedings of the board upon which the said order is based are hereby affirmed."

Where the constitution requires telephone companies to make physical connections of their plants, the necessary mechanical union must be effected so that messages may be carried from the lines of one company to those of the other. Railroad commissions, vested with the authority to regulate this service, must require the companies to make the connection under their direction, and the cost of doing so, as well as the proper division of tolls for the connected service, must be fixed by the commissions; and in case they fail or refuse to do so, the courts will compel them to perform their statutory duty in the matter. This principle is stated and discussed as follows in the case of *Railroad Commission v. Northern Kentucky Tel. Co.*, 236 Ky. 747, 33 S. W. (2d) 676, where the court said: "There is no room for doubting that section 199 of the Constitution of Kentucky requires telephone companies operating exchanges in different towns, or cities, or other public stations, to receive and transmit each other's messages without unreasonable delay or discrimination. It was the intention of that section that tele-

phone companies falling within the provisions should make such physical connection as might be required so that a message originating on the lines of one company might be transmitted over the lines of the other company through such mechanical arrangements that might be found necessary to enable the carrying of the message. * * * The connection between telephone lines as contemplated by section 199 of the Constitution of Kentucky is a mechanical union of the lines for the transmission of messages for the public convenience and without destroying the property rights of either company. The rules and regulations for making the mechanical connection are what the railroad commission must work out under the provisions of the statute above cited. * * * When a message originates on one line and is transmitted over it and another line or lines, it is required that a division of the toll charges be distributed between, or among, the lines on a basis that is fair and equitable. The railroad commission is the body vested with the authority to determine such a matter. There may be some cost of making the mechanical union, although in the case before us it appears that such cost would be insignificant, and the commission may determine who shall pay the cost of making the physical connection. * * * So the constitution means that, when a good-faith telephone company makes a request that it have physical connection with another such company, the railroad commission is without authority to refuse a connection whereby messages may be transmitted over the respective lines. The rules and regulations controlling the matter of tolls and other details after the connection is made must be worked out by the railroad commission. No questions of taking property without due process of law, or kindred matters, call for determination in the case before us, as the railroad commission failed to perform its first duty about which it had no discretion. The railroad commission is a ministerial body, and, if it fails to perform its duties, it may be compelled by mandamus to do so. We have reached these conclusions briefly expressed from a consideration of the constitutional and statutory provisions involved and the many cases found annotated and discussed. (11 A. L. R. 1204; 16 A. L. R. 352.)"

While the public utilities commission may require a continuous line of communication for telephone service by establishing a connected line of communication of different companies for long distance service, they may not require the physical connection of the plants themselves for the intercommunication of local

service, for this would amount to the taking of property without compensation and would exceed the regulatory powers of the commission as is indicated in the case of *Gilman v. Somerset Farmers Co-operative Tel. Co.*, 129 Maine 243, 151 Atl. 440, where the court said: "Both respondents being public utilities, the public utilities commission had jurisdiction of the complaint, and power to require a physical connection of the lines of the respective systems, on proof that a mechanical connection of the lines, to form a continuous line of communication, for public convenience and necessity, but not 'primarily to secure the transmission of local messages or conversations between points in the same city or town,' would be reasonably possible. Questions of fact pertaining to a case are for consideration and decision by the public utilities commission. * * * In the case at bar, the evidence, though sharply conflicting, was sufficient to justify finding that physical connection of the lines of the two companies to form a continuous line of communication, that is, a connection of the line and not of the companies, essentially for other than local telephonic intercommunication, would be reasonably practicable and capable of execution and service or further public convenience and necessity. * * * The public utilities commission may, to some extent, affect and curtail the property and property rights of public utilities, but the commissions may not, under the guise of supervision, regulation, and control, take such property and rights. Property and property rights may not be taken, except the taking be by eminent domain. *New England Telephone, &c. Co. v. Department of Public Utilities*, 262 Mass. 137, 159 N. E. 743, 56 A. L. R. 784, *supra*. In the instant case the public utilities commission has transcended its powers."

§ 687. **Physical connection by contract available to all alike.**¹⁷—While under the common law, in the absence of constitutional or statutory provision of the state requiring competing companies to make physical connection of their plants and exchange service between them, they can not be required to do so; if such connection is voluntarily made by virtue of a contract between them, the public thereby acquires an interest in the connected service which becomes available to all subscribers of telephone service, for as the court in the case of *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319, decided in 1909, said: "A telephone company doing a general telephone

¹⁷ This section (§ 559 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

business is a common carrier of news. * * * This duty does not amount to an absolute requirement that one company or individual shall furnish the patrons of another the use of its or his exchange and lines, unless it has been voluntarily undertaken, so that he or it may not afterward discriminate in classification. * * * Such physical connection can not be required as of right, but if such connection is voluntarily made, as is here alleged to be the case by contract, so that the public acquires an interest in its continuance, the act of the parties in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence, and it imposes upon the property such a public status that it may not be disregarded. * * * We think it certain that the property of each of the parties is impressed with such a public interest that neither can disregard it [the agreement for physical connection]. * * * If service is furnished to one, another in the same town or city is entitled to the same service, not upon the ground of a primary right, but because, having elected to furnish service to one, the same obligation arises in favor of all others like situated."

That the state may require physical connection between all telephone plants, especially when voluntarily made between some, is clearly decided in the case of *State v. Skagit River Tel. & T. Co.*, 85 Wash. 29, 147 Pac. 885, P. U. R. 1915C, 902, where the court spoke as follows: "It must be determined therefore whether the requirement of the public service commission of the connection of the lines of these two telephone companies is a valid regulation, or whether it is a taking or a damaging of the property of one of the companies without due process of law or without compensation being first made and paid to the owner. * * * In the instant case no power of eminent domain is invoked, and no compensation or damages were determined or allowed to respondents. There is, of course, a marked difference between a requirement of connection and free use of the telephone lines of one telephone company by another, and the requirement of the same and the payment of compensation and damages therefor under the right of eminent domain. * * * The situation presented here is somewhat similar, excepting the element of danger, of course, to a requirement by the state that one railroad company should allow physical connections with its line by one or more other railroad companies at some common point, and permit either or both said connecting companies to run trains at will over the property and tracks of the first

company. * * * That, when one telephone company has opened its lines to physical connection and services for another telephone company upon certain terms, it can be required as a state regulation within the police power to accord the same facilities, conveniences, and uses to another or other telephone companies upon equal terms. * * * Our conclusion further is that the commission has power to order such physical connection as it has ordered in this case under our constitution and statutes, but that it must make such orders as will not discriminate, or favor, one company or concern above another. It found in this case that the cost of connection would be fifty dollars. However that may be, before its order will be valid it must provide for the payment to the Skagit Company of the cost of making the connection by either the petitioners or the independent company. It must further provide for such reasonable regulation as will prevent interference between the independent company and the Pacific Company when using the lines of the Skagit Company. It must further provide for such reasonable joint rates or tolls as shall be appropriate between the lines of the Pacific Company and of the independent company in conjunction with the Skagit Company, for the use of the Skagit Company's lines. When such provisions are made, the order of the commission will comply with the letter and spirit of the constitution and of the statute relating to such regulation."

In this same case, as reported in 151 Pac. 1122, the court modified its opinion by saying that the commission "can not act judicially, but has only quasi-judicial powers to examine the facts and find accordingly." A further modification is made of this case, as reported in 89 Wash. 625, 155 Pac. 144, where the court said: "We are still satisfied with the original decision to the effect that, under the law, the commission has power to order the physical connection between the telephone lines of the Independent Company and the Skagit River Company and the necessity therefore is a question exclusively within the discretion of the commission. * * * The fact was overlooked that both companies subject to the order—the Independent and the Skagit River—were and are willing to make the physical connection, and there is no warrant for the direction that the cost thereof, whatever that may be, be provided for by the order of the commission. * * * Nor has the commission any authority under the statute in the first instance to make any rules or regulations to prevent interference between the Independent

Company and the Pacific Company when using the lines of the Skagit Company. The Pacific Company has no vested or lawful right to prevent the use of the Skagit Company's lines by the Independent Company as ordered by the commission, and, if such use in any way interferes with the use by the Pacific Company of its lines as connected with the Skagit Company, it must prevent or avoid same by mechanical means or by operating rules put in force by the several companies interested. These modifications result in a complete affirmance of the order of the public service commission, and reversal of the judgment of the superior court."

§ 688. Through telephone service peculiarly necessary.¹⁸— After recognizing the necessity for through service in the operation of telephone plants because the conversation can not be relayed as in the case of a telegram or as passengers can change cars or be transferred from one railroad to another for the reason that the act of speaking over a telephone is single and instantaneous, the court, in the case of *United States Tel. Co. v. Central Union Tel. Co.*, 171 Fed. 130, decided in 1909, in refusing to recognize the validity of a contract between a municipal public utility rendering local telephone service and one rendering long distance telephone service, by which for a long period of years the latter company would enjoy the exclusive service from the local plant, for the reason that this would restrict the customer of the local service to the use of one long distance company as well as tend to stifle competition, said: "But we have a very different situation where, as in this case, a local company, assuming that it can not be compelled to make or permit a connection with a long distance company, does in fact permit it. If the local company extends the use of its lines to long distance service, does it make the long distance service any the less of a public character than its local service? Assuming that it had a right to remain independent of and isolated from long distance business, does it not give up that right of local independence and isolation when it takes on long distance business? And if, in respect to long distance business, it has granted the right of connection to one long distance company, can it, either under the common law or the statutes of Ohio, deny to one long distance company the right and privilege which it has granted to another? It seems to me that to put

¹⁸ This section (§ 560 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

this question is to answer it.¹⁹ The courts have had great difficulty in getting away from the proposition which I have suggested in the discussion under the head immediately preceding this. They have had difficulty in escaping the conclusion that a local company must permit connection to be made with other exchanges, whether it desires to do so or not. But they have found themselves compelled to come to the conclusion that where two companies have permitted a connection to be made between their exchanges, without having fixed by contract any period of termination, no disconnection of the systems can be permitted except such as arises out of the total retirement from business by one or the other company."²⁰

That physical connections may properly be required to meet the public demands for service is clearly decided in the case of *Pacific Tel. & T. Co. v. Wright-Dickinson Hotel Co.*, 214 Fed. 666, where the court said: "Considering the explicit purpose of the act, and these ample provisions, it would seem that nothing further is needed or requisite for conferring upon the commission adequate power and authority for the regulation of interchange of business between telegraph and telephone companies which, by the very nature of things, comprises and includes the power to require physical connection between competing utilities for facilitating such interchange of business. In other words, the power to regulate within the purpose and spirit of the act includes the power to require physical connection; otherwise regulation would prove largely ineffectual in practical application. We are not impressed with the suggestion that this power of regulation must be specifically conferred by constitutional authority. * * * These cases, it is true, relate to a physical connection required by a local commission to be made between railroads, but the analogy to a case where a physical connection is required to be made between telegraph and telephone utilities is patent and obvious. The Pacific Company is required to accept the messages from the hotels and transmit them, for which service the commission awards it a compensation of three and one-third cents for each call going out from the hotels and transferred from the switchboard of the Home Company to that of the Pacific Company. For any transmission of messages it may make over its long distance lines it receives its own charges, and for local messages its tolls for instruments installed, in addition to the compensation allowed

¹⁹ *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583.

²⁰ *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

for the call, and the compensation stipulated for under its contract with the Hotel Company for putting in and maintaining trunk lines, switchboards, and booths is not interfered with. The commission has said that the charge of three and one-third cents is reasonable for each call going out of the hotels, and with this we are not now concerned. Now can it be said that the requirement that the Pacific Company shall accept the messages from the hotels and transmit them, it receiving a reasonable consideration for each call, is an exercise of eminent domain and a taking of the plaintiff's property without just compensation? It is not a new or different use or burden that is required by the service, nor does another or different person, corporation or entity occupy or utilize the lines or system of the plaintiff company. It is still left in the full and unrestricted occupancy and operation of its own lines or system, except that it is required to observe and comply with a regulation that the commission has deemed proper to impose upon it, namely, that it transmit also the messages coming from the hotels which originate on the wires of the Home Company. This is not a taking of the plaintiff's property in any sense. It is but a reasonable regulation which is properly referable to the police power of the state. See *Pioneer Telephone & T. Co. v. Grant County Rural T. Co.*, 119 Pac. 968; *Pioneer Telephone & Telegraph Co. v. State*, 38 Okla. 554, 134 Pac. 398."

Where through service is necessary, which can be secured or facilitated by physical connections, this will be required, for as the court said in *Northern Indiana & Southern Michigan Tel. & Cable Co. v. Peoples Mut. Tel. Co.*, 187 Ind. 486, 119 N. E. 212, P. U. R. 1918D, 548: "Appellant's claim that it will be irreparably injured if the commission's order is enforced can not, in view of what appears in its complaint, be sustained. No facts are alleged leading to this conclusion, but rather to a contrary conclusion. * * * The complaint of appellant, when analyzed and reduced to its substance, is that appellant will be subjected to competition in its long-distance business. This alone is not a reason for preventing the enforcement of the commission's order. Something more than the individual interests of two contestants must appear before the state is warranted in interfering to prevent or to permit competition. Appellant does not allege facts showing that it has a property right or vested interest in its long-distance contract superior to the state's power, exercised by the commission, to interfere therewith for the public good. * * * If it be a fact that the present order as is claimed by

appellant, requires that the connection be made to the present wires of the Home Company used by appellant, and that this will materially interfere with appellant's service, this is a mere detail, subordinate to the greater question of the public welfare involved, and the commission's order as to such details can be modified on petition, as the order and the statute expressly provide. *Chicago, &c. R. R. Co. v. R. R. Commission*, 175 Ind. 630, 95 N. E. 364. * * * The question is whether the 1,500 patrons of one of the companies shall be denied long-distance connection, direct with a long-distance company, or be subordinated to a marshaling of its long-distance messages by the management of its competitor, a very different proposition."

Where, however, the needs of the public do not require additional through telephone service the physical connections of independent plants may not be required, for as the court said in *Shafar v. Public Utilities Comm.*, 94 Ohio St. 230, 113 N. E. 809, L. R. A. 1917E, 1080, P. U. R. 1916F, 432: "The statute under consideration confers authority upon the commission to require two or more telephone companies to establish and maintain through telephone lines within the state between two or more localities where certain conditions exist. In the exercise of this authority the commission must act pursuant to law. If conditions prerequisite to the making of the order asked for in the present case do not exist, the commission is without power to act. Our holding is that the situation presented here does not call for the exercise of the power conferred by section 614-63. The localities in question can be communicated with and reached by the lines of the Cincinnati & Suburban Bell Telephone Company, and, public necessity not requiring additional service between these two localities, a situation does not arise which calls for the exercise of the power conferred upon the commission."

That through service must be available to all is the effect of the decision in the case of *Pioneer Tel. & T. Co. v. State*, 78 Okla. 38, 188 Pac. 107, P. U. R. 1920D, 382: "It appears from the findings of the commission the Pioneer Telephone & Telegraph Company and the Farmers Mutual Telephone Company each maintains a telephone exchange in the town of Weatherford; that both companies are operated for hire, and subscribers to the Farmers Mutual Company could not use the long distance facilities of the Pioneer Telephone & Telegraph Company for the reason there was no physical connection between the two lines; that the public convenience and necessities would be benefited by such physical connection. Under section 5, article 9, of the

Constitution, a physical connection is mandatory; the only limitation being that the rules and regulations prescribed by the commission as to such operation shall be reasonable and just. *Pioneer Telephone & Telegraph Co. v. State and Darnell*, 71 Okla. 305, 177 Pac. 580 [P. U. R. 1919C, 544]; *Pioneer Teleg. & Teleph. Co. v. State*, 38 Okla. 554, 134 Pac. 398. This order provides, among other things, that the Mutual Telephone Company shall pay the cost of making the physical connection and shall guarantee to collect and pay to the Pioneer Company the toll charges originated on its lines; shall give prompt service to its patrons desiring long distance connection with the Pioneer Company. This, in view of all the circumstances as disclosed by the evidence, seems a reasonable and just provision; the only addition necessary being a provision for service to the subscribers of the Pioneer Company, and to cover which the order should be so modified as to provide that the Farmers Mutual Telephone Company shall give prompt service and connection to the patrons and subscribers of the Pioneer Telephone & Telegraph Company and those having connection with these lines who desire long distance connection with the patrons and subscribers of said Farmers Mutual Telephone Company."

That payment must be made as a condition for through service connections is decided in the case of *Pioneer Tel. & T. Co. v. State*, 77 Okla. 216, 186 Pac. 934, P. U. R. 1920C, 557, as follows: "This section has been held mandatory in requiring physical connections of the lines, the only limitation being that rules and regulations, prescribed by the commission, shall be reasonable and just. *Pioneer T. & T. Co. v. State and Darnell* [71 Okla. 305], 177 Pac. 580; *Pioneer T. & T. Co. v. State*, 38 Okla. 554, 134 Pac. 398. In the instant case it appears it was not a mere physical connection of the lines that was requested and ordered, but a routing of the messages. * * * The Pioneer Company refused to accept messages routed from Addington to Duncan, by way of Hendricks' line to Comanche, but instead sent calls for Duncan, originating at Addington, south over its own lines to Waurika, thence to Duncan. The relief prayed is that the Pioneer Company be compelled to permit the routing of messages north from Addington, and to put through such calls over Hendricks' toll lines and connect impartially and with dispatch. * * * Here we have two companies competing for the same business, required to make such physical connection between their lines and exchanges as would permit one company to have the benefit and use of the equipment and system of the other

to its detriment. This connection would amount to the taking of property without due process of law."

§ 689. **Undertaking to furnish connected service becomes general.**²¹—The decision in the case of *Clinton-Dunn Tel. Co. v. Carolina Tel. & T. Co.*, 159 N. Car. 9, 74 S. E. 636, decided in 1912, sustains the principle that, having agreed to connect their telephone system and to give exchange service, the companies are thereby precluded from disconnecting their plants and are obliged to furnish all with exchange service who are or become customers of either company. In the course of its opinion the court said: "In the absence of constitutional or statutory requirement, this obligation to afford service at reasonable rates and without discrimination to all who will 'pay the charges and abide by the reasonable regulations of the company' does not as a rule extend to making physical connection with the company's lines, but there is high authority for the position that, when such physical connection has been voluntarily made, under a fair and workable arrangement and guarantied by contract and the continuous line has come to be patronized and established as a great public convenience, such connection shall not in breach of the agreement be severed by one of the parties. In that case the public is held to have such an interest in the arrangement that its rights must receive due consideration."

§ 690. **Holding out consolidated service establishes it permanently.**²²—This principle is sustained in the case of *Mahan v. Michigan Tel. Co.*, 132 Mich. 242, 93 N. W. 629, decided in 1903, where the competing plants were bought by the same party and their exchanges connected. In refusing the right to disconnect the service and in holding that the connection between the exchanges, once having been made, became constantly available to the public, the court said: "Users of the Detroit Telephone Company accepted this service and paid for the same for a period of something like a year and a half. We are of the opinion that the furnishing of the service by the respondent, the Michigan company, and the acceptance thereof by the subscribers to the Detroit company, if it did not constitute a new implied contract between the Michigan company and said subscribers, at least furnishes a construction of the terms of the ordinance by

²¹ This section (§ 561 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

²² This section (§ 562 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

the parties themselves which the respondent, the Michigan Telephone Company, is not now at liberty to repudiate."

That where consolidated service is demanded by the necessity and convenience of the public it will be required is clearly indicated in the case of Michigan State Tel. Co. v. Michigan Railroad Comm., 193 Mich. 515, 161 N. W. 240, P. U. R. 1917C, 355: "We think the statute must be held to give the commission authority, if other necessary conditions exist, to order a physical connection of telephone lines whenever and wherever those lines 'by such connection can be made to form a continuous line of communication,' whether the communication is between different towns or between subscribers to different telephones in the same town. * * * In support of this position our attention is directed to Pacific Telephone & Telegraph Company v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822. With all due respect for that court, however, we find ourselves unable to agree with its conclusion as to the effect of a connection between competing lines. The business of a telephone company is to transmit oral messages from one point to another, and for that purpose every patron, whether he is a subscriber or not, has the use of its lines for the time being. That is the public use to which they are dedicated. Without the physical connection each subscriber to a Citizens' telephone is entitled to the same use of complainant's lines that he would have with the physical connection; the difference being that with the lines connected he can talk from his own telephone, while without the connection he would be obliged to go to a public station of complainant company. The relations of a telephone company in this state are not simply with its own subscribers, but with the public generally, and it is forbidden by law to make any discrimination between persons. Howell (second edition), section 7221. Complainant would have the same control over its own lines if the Citizens' subscriber should talk from his house or office that it would have if he should talk from one of complainant's public stations; and complainant, not the Citizens' Company, would receive compensation for the use of the lines. It would amount simply, so far as this phase of the matter is concerned, to a difference in the way messages were got to and from the Citizens' subscribers, and would be, not a taking of property by eminent domain, but a regulation in the interest of the public. This conclusion, we think, is in accordance with the weight of authority. Pacific Tel. & Tel. Co. v. Wright-Dickinson Hotel Co. (D. C.), 214 Fed. 666; Pioneer Tele-

phone & Telegraph Co. v. State, 38 Okla. 554, 134 Pac. 398; Wisconsin Telephone Company v. Railroad Commission, 162 Wis. 383, 156 N. W. 614, L. R. A. 1916E, 748. * * * The telephone has become a vital element in the business and social life of the people, and enters so largely into the conduct of all their affairs that the elimination of unnecessary expense and the saving of time in its use have become matters of importance. Men can no longer afford to loiter around public pay stations for the purpose of sending or receiving messages, and the duplication of instruments in the house and office has grown into a waste of large proportions. These evils come largely from the existence of competing companies in the same community, and so far as reasonable regulation can improve the situation such regulation is assuredly required by public convenience and necessity. Communities should not be held up until one or the other of adverse companies has been eliminated through the long battle of competition, if the delay can be justly and lawfully avoided. This was evidently the view of the legislature when telephone companies were brought under the control of the railroad commission, and that body was given the powers of regulation conferred by the statute referred to. * * * It is for complainant to show affirmatively that the physical connection ordered by the commission will inflict upon it an undue loss and one that can not be prevented by the contemplated adjustment of rates, tolls, and charges. The interest of the public in a proper regulation of public service corporations is continually becoming more vital and important, and any action of the state through its organized boards and commissions in the exercise of that power should not be set aside by the courts, except in instances of the clearest necessity."

The rule as to connections between telephone plants at common law and under statutory enactments is set out in the case of Blackledge v. Farmers Independent Tel. Co., 105 Nebr. 713, 181 N. W. 709, 16 A. L. R. 343, P. U. R. 1921C, 668, as follows: "It is the contention of the Farmers Company that a physical connection can be required between telephone companies only through a legislative enactment or by virtue of contract, and that the order of the railway commission goes beyond the provisions of the statute, Laws 1913, c. 79 above mentioned. It is true, that, by the common law, public utilities owed no duty beyond their existing lines, and, therefore, no obligation to make physical connections or exchange service with each other. Each had the right to operate independently. Where the common law

is not changed by legislation, a court would, therefore, finally find no authority upon which to base an order for such physical connections or exchange of service. * * * The order of the railway commission, in the case here before us, requires an exchange of all local service, and provides a flat rate, instead of an individual switching charge, as compensation for the additional service to be rendered by the respective companies. * * * We do not hesitate to say that the order of the railway commission, requiring the division of new business, can not be legally justified, and is the taking of property rights without due process of law. The provision as to the division of such new business is so correlated and interdependent with the other provisions of the order that it can not be separated from them. The order of the railway commission in this case is an entirety."

§ 691. **Exclusive contract for through service upheld from necessity.**²³—The case of *Cumberland Tel. & T. Co. v. State*, 100 Miss. 102, 54 So. 670, 39 L. R. A. (N. S.) 277, decided in 1911, sustained a contract between a municipal public utility rendering local telephone service and one rendering long-distance service for the exclusive service of the latter company as well as the agreement to the effect that the local company would not extend its lines so as to conflict with the business of the long-distance company. This decision is opposed to those already mentioned so far as it upholds the contract for exclusive service, the practical justification for the decision apparently being that it was necessary in order to secure long-distance service for the customers of the local company. The question as to the necessity of the contract, however, would seem a debatable one, as the long-distance company had already established itself in the territory of the local company and its own interest would probably have received long-distance service from the customers of the local company in the absence of an exclusive contract for that service on finding that it was impossible to secure such a contract. The reason given for the decision is neither convincing nor in harmony with what seems to be the prevailing rule regulating the furnishing of such municipal public utility service. In the course of its opinion the court said: "The contract on the part of the Oxford System to give its long-distance messages to the Cumberland exclusively, for the period of the contract was not in violation of the law. It was based upon a valuable consideration

²³ This section (§ 563 of second ties *Comm. v. Postal Telegraph-*
edition) cited in *State Public Utili-* *Cable Co.*, 285 Ill. 411, 120 N. E. 795.

to both systems, and was not inimical to the public interest in any way."

§ 692. **Necessity for exclusive service question of fact.**²⁴—A decision similar in its effect to this, although not to the same degree objectionable is found in the case of *Home Tel. Co. v. North Manchester Tel. Co.*, 47 Ind. App. 411, 92 N. E. 558, decided in 1910, where the court upheld a contract for the exclusive service of all outgoing messages to points reached by the long-distance company in question for the reason that such an agreement was necessary to secure long-distance service, although the contract did not exclude the local company from receiving incoming messages over other long-distance lines or sending messages over other lines to points not served by the former long-distance company. In the course of its opinion the court said: "The contract in question does not provide against connections being made with appellants' switchboard by other companies or receipt of messages therefrom, and therefore it can not be said that it was a violation of the agreement to permit the Commercial Telephone Company to connect therewith, and thereby transmit messages to appellant. The contract does, however, provide that all of the toll business originating in or through the appellant company for transmission to points on appellee's lines should be given to appellee. * * * But the rule is that all contracts in restraint of trade are not necessarily invalid where such restraint is only partial, incidental or minor to the main object sought to be obtained which is for the public good. * * * It is found by the court that the contract in question was entered into for the purpose of establishing a competitive long-distance telephone system in the localities reached; that such a mutual agreement was essential to the existence of such a system. The main purpose of the combination was therefore not to restrain trade, but to extend it; the restraint in effect, if any, being only incidental and minor."

§ 693. **Common-law and statutory regulations distinguished.**²⁵—That relief of this nature is available by constitutional or statutory provision requiring it is suggested in practically all the decisions from the early one of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. 185, decided in 1884, where the court in the case of a

²⁴ This section (§ 564 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

²⁵ This section (§ 565 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

common carrier said that as the one corporation is not bound to carry beyond its own line, if it contracts to do so under the common law, it has the right to select the company in connection with which it would carry out the contract for through service, the court adding, however, that: "Such matters are and always have been proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature."

The courts are agreed that in the absence of a statutory or constitutional provision requiring the making of physical connection between telephone plants or of their voluntarily agreeing to do so that the customers of either have not the right to require exchange service with the customers of the other, for as the court in the case of *Home Tel. Co. v. Peoples Tel. & T. Co.*, 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550, decided in 1911, said: "Telephone and telegraph companies are common carriers of intelligence, and must give the same service on the same terms to all who apply therefor, without partiality or unreasonable discrimination. But this does not mean that a telephone company is bound to permit another telephone company to make a physical connection with its lines for the purpose of using them as its own subscribers use them. There is a wide difference between a telephone company's transmitting to any point on its line equally and indiscriminately the messages of all companies that offer them and are willing to pay the same fare for the same service, and admitting such outside companies or their patrons to the same use of its lines that its own patrons are entitled to."

§ 694. **Public and private business distinguished.**²⁶—This court also takes exception to the position of the Supreme Court of Indiana in the decision of *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319, already referred to, in requiring that competing companies which have agreed to connect their service shall continue to give such service so long as they maintained their exchanges. In holding that this was an undue interference with the right to contract, the court failed to recognize the difference between the exercise of this right with respect to private business and those concerned with the giving of service to the public, for the municipal public utility undertaking to serve the public in a particular way is generally held liable to serve all

²⁶ This section (§ 566 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

without distinction so long as it undertakes to render public service. In the course of its opinion, criticising the decision of the Supreme Court of Indiana to this effect, the court said: "Such a rule, while in terms asserting the independent right of contract, denies its existence in fact. Moreover, it enables one company to take the property of another for public use without compensation, and deprives the latter company of its property without due process of law, in violation of the Constitution of this state and of the United States."

Reasonable rules and regulations for furnishing telephone service, including the issuance of directories, are matters belonging to the public service commissions and their action will be upheld by the courts unless arbitrary and unreasonable, as is indicated in the case of *Baldwin v. West*, 160 Md. 202, 152 Atl. 907: "It was the right and duty of the commission to decide whether the suggested regulations were necessary for the proper control of the public utility and for the protection of individual and community interests in its service. A perusal of the rules urged by the appellants suggests at once the inquiry whether they may not involve an unduly detailed regulation of the telephone company's business and an inexpedient definition of its responsibility. It could certainly not be held that there was no adequate basis for the commission's determination of that question. Its adverse conclusion could be reached in the exercise of a rational judgment and within the scope of its lawful authority. There is consequently no ground upon which its decision may or should be judicially disturbed."

§ 695. **Necessity for state regulation to insure public complete service.**²⁷—A strong statement of the common-law rule denying the right to require physical connection between telephone plants and of the consequent necessity for state regulation in this respect if the public is to have the advantage of complete service is furnished in the case of *Home Tel. Co. v. Sarcoxie Light & Tel. Co.*, 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124, decided in 1911, where the court said: "It must be borne in mind that, as to business coming from the Bell Company to the Sarcoxie Company, the Bell Company is in the attitude of an individual, with no less nor more rights. The individual in the town can compel the Sarcoxie Company, upon tender of proper charges, to extend its service by phone to his place of business or residence. The corporation can do the same

²⁷ This section (§ 567 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

thing, but not more. The individual can not build a line of his own and demand physical connection; neither can the corporation. If the Bell Company at Sarcoxie demanded of the local Sarcoxie Company that it place a phone in its place of business, such would be within the rights guarantied by the statute. If it went to the Sarcoxie Company and tendered the proper fee, and said it wanted to talk over their line, such would be within the statute; but if it demanded that a physical connection be made between the two lines, so that its customers could talk over the lines of the Sarcoxie Company, that is an entirely different question. With its customers the Bell Company is doing in a way a private business. This private business it can not foist upon a competing line, save and except as an individual could go to such competing line and demand service. In other words, one telephone company, without the consent of the other, can not take charge of and use the instrumentalities of such other company by compelling physical connection therewith. The statute in question never so contemplated."

§ 696. Service of common carrier and telephone distinguished.²⁸—A further decision on this phase of the question is furnished in the case of *Pacific Tel. & T. Co. v. Anderson*, 196 Fed. 699, decided in 1912, where the court upheld an exclusive contract between municipal public utilities rendering telephone service and denied this right to make physical connection with the plants belonging to the parties to the contract to any other company or individual, in the absence of a constitutional or statutory provision requiring that such connection be made. The tendency of this decision is not in harmony with the case of *United States Tel. Co. v. Central Union Tel. Co.*, 171 Fed. 130, and other cases which have already been discussed. As the decision is based on reasoning by analogy to the case of agreements for through service commonly entered into between connecting rather than competing railroads, the decision fails to distinguish between the nature of the service rendered in the two cases, for while complete through service may be provided by a contract between such common carriers, such service is not furnished by a contract between two telephone companies which are either competing or connecting because only subscribers to their telephone service are included by virtue of such an exclusive contract, and they are excluded from all other service.

²⁸ This section (§ 568 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

The federal decision in the case of the United States Tel. Co. is based upon statutory provisions in Ohio, which the court found clearly prohibited the making of exclusive contracts for such service because their tendency was to stifle competition, while in the Pacific Telephone Company case, as indicated by the decision, the state of Washington had enacted no such statutory provisions, but instead had provided that the matter of requiring physical connection between telephone companies for the sake of securing through service be placed in the hands of its public service commission with power to require such connection to be made where in its opinion such connection should be established. In the course of its opinion the court said: "All the authorities agree that at common law each telephone company is independent of all other telephone companies, save for the duty to receive and forward to any point on its line messages received from such other company or companies; and hence, that it is not bound to accord to any such outside organization or its patrons connections with its switchboard on an equality with its own patrons; that such connection is a privilege to be accorded only as the result of private contract or in obedience to some constitutional or statutory provision. *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Home Telephone Co. v. Peoples Tel. & Tel. Co.*, 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550, decided December 16, 1911, by the Supreme Court of Tennessee. I do not understand that this rule is questioned by the defendants, but they earnestly maintain that, because the Anderson Company made physical connection with the complainant company, it was bound by the common law to grant the same privileges to any other individual or company on the same terms and conditions. I can not concede that such is the rule of the common law. * * * Where a public service corporation enters into private contracts with others in furtherance of its business, I find no warrant for holding that its public duties are in all cases extended to the full scope of the private contract. * * * The defendant companies had therefore no right to demand a physical connection with the Anderson line simply because that right had been accorded to another, and they certainly have no such rights under the statute of this state, for that statute vests the power and discretion to direct physical connection in the public service commission. *Laws Washington 1911*, page 585, section 73."

§ 697. **Cost and value of telephone service with increase of subscribers.**^{28A}—The question of what constitutes a reasonable rate for telephone service is rendered more complex than in the case of most other municipal public utilities because of the different classes of service rendered and especially for the reason that in the case of telephone service, unlike other municipal public utilities, the theory obtains that a decrease in the rate resulting in an increase in the volume of the business will not yield increased profits proportionally, because the increase in the volume of business secured is accompanied by a corresponding increase in the operating expenses. The fact is admitted that the value is determined by the extent of the telephone service furnished, which depends directly upon the number of customers served by the particular telephone system, for connection with all subscribers is available to each customer by virtue of the fact merely that the others are customers which in other municipal public utilities is an element of no consequence because the nature and extent of the service received by each customer is individual and independent of the others, the number of which does not increase the value of the service furnished the individual customer. It is evident that a telephone exchange with a thousand subscribers is more valuable to each of the thousand subscribers than one with a hundred subscribers would be to each individually, and this fact of the increase in the value of the service with the increase in the number of customers served, together with the fact, if it be a fact, that the expense of operation, especially that of maintaining and operating the switchboard, increases correspondingly with the increase in the number of the subscribers to the service, makes it evident that the determination of the proper rate for telephone service requires that these two elements, which seem to be peculiar features of telephone service, be considered in addition to other features which are common to the service of all municipal public utilities.

§ 698. **Doctrine of increasing cost of service peculiar to telephone.**²⁹—The doctrine which is claimed to have application peculiarly to the case of the municipal public utility rendering telephone service to the effect that the expense of operation increases correspondingly with the increase of business, so that the general rule, applicable to other municipal public utilities

^{28A} This section (§ 555 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 235 Ill. 411, 120 N. E. 795.

²⁹ This section (§ 569 of second edition cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 235 Ill. 411, 120 N. E. 795.

where the volume of the service and the consequent profits of the company may be increased by decreasing the rates for the service, is recognized as being inapplicable to this service by the Supreme Court in the case of *Railroad Comm. of Louisiana v. Cumberland Tel. & T. Co.*, 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. 357, decided in 1909, as follows: "If higher rates have been in operation, and the result has shown that they were only reasonable and fair rates, it would, in such a business as this, follow, with considerable certainty, that, with lower rates, the profits would be decreased and become unreasonably low. We say this because the evidence shows that, in the case of telephone companies, the general result of a reduction of rates in some other kinds of business does not always follow—namely, that there would be an increased demand, which could be supplied at a proportionately less cost than the original business. Such, it is admitted, would be the case generally in regard to water companies, gas companies, railroad companies, and perhaps some others, where the rate is a reasonable one. * * * In these cases increased profits might be the result of decreased rates. But with telephone companies, as shown by the testimony of the president of the complainant, the reduction in toll rates does not bring an increased demand, except upon the condition of corresponding increase in expenses."

§ 699. Value of service increases with its amount.³⁰—A further pertinent decision on this point illustrating the reason for the doctrine which seems peculiar to the case of the municipal public utility rendering telephone service is furnished in the case of *Bradford v. Citizens Tel. Co.*, 161 Mich. 385, 126 N. W. 444, 137 Am. St. 513, decided in 1910, where the court, in refusing to permit the company to distinguish between the rates charged old and new subscribers for the same service, stated that: "While it is probably true that the cost of operating a telephone exchange increases with the increased volume of business, it is equally true that the whole body of subscribers, whether new or old, makes the added expense, and reaps the added benefit. A telephone exchange with 1,000 members is manifestly more valuable to every subscriber than one with 100 members, but it is equally valuable to each member in the same class, and its value to the subscriber does not depend, in any degree, upon whether he is a new subscriber or an old one. It is difficult to understand why new subscribers should pay any

³⁰ This section (§ 570 of second edition) cited in *State Public Utilities Comm. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N. E. 795.

more for the right to talk to old members than the latter do for the right to talk to new ones."

That the cost and value of telephone service increases with the amount furnished, which is determined by the capacity of the exchange or number of subscribers connected with the service, is generally recognized, and the rate for the service in different localities and through independent exchanges varies with the cost and extent of the service, for as the court said in the case of *In re Northwestern Bell Tel. Co.*, 164 Minn. 279, 204 N. W. 873: "We think that this provision, in connection with the other provisions of the act, gives the commission ample power to authorize and require reasonable and adequate rates for exchange service at any given locality in the state; and also to authorize and require, from time to time, such changes in the rates in a particular locality as may be found necessary in order to make them reasonable and adequate. Rates, which were reasonable at the time and under the conditions existing when adopted, may be either too high or too low at another time under different conditions. * * * The difference in rates for different localities is explained in part by the difference in the number of people to whom a particular exchange gives access at a flat rate, and in part by differences in other conditions which render the installation and operation of an exchange more expensive per station in some localities than in others. The commission found that the situation at Duluth is peculiar and the expense of both installation and operation unusually high, and took that fact into consideration in fixing the rate. The statute does not contemplate that rates shall be uniform throughout the state, and no one claims that such a requirement would be reasonable or practicable."

§ 700. No discrimination in rates or limitation of service.—The rule refusing the right to discriminate in rates for the same service, although permitting the municipal public utility to classify the telephone service rendered along reasonable lines is as well established as to the giving of telephone service as that of any other municipal public utility. Nor should a contract for telephone service discriminate as to the class or number of persons to be served by a contract to take service exclusively of one company, for as the court in the case of *Central New York Tel. & T. Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, decided in 1910, said: "It is manifest that the exclusive clause is a contract in restraint of trade. It prevents anyone in the Yates Hotel from having telephone communication with cus-

tomers of other telephone companies than the plaintiff. It prevents the persons served by such other companies from having telephonic communication with the Yates Hotel. It likewise destroys competition by shutting out all rivals of the plaintiff.

* * * The feature of the modern telephone system which constitutes its public value and affects it with a public interest is its ability to bring each customer into vocal communication with hundreds and oftentimes thousands of others. This makes it an instrument of great public convenience and utility, the usefulness of the service offered by each company being directly proportionate to the number of persons who can be reached thereby. The franchise having been granted because of this very element—that is to say, the capacity to serve the community so generally by serving so large a number of individuals constituting the community—it can not be tolerated that any grantee of the franchise shall exercise it in such a way as to lessen the value of the telephone as an instrumentality of service to the public. If a telephone company may contract for the exclusion of any other telephone service from the premises of its customers, it may thus deprive all those customers of telephone communication with every person who takes telephone service from rival concerns, and thus prevent just what all telephone franchises are designed to promote—that is, the availability to every member of the community who desires it, and can afford to pay for it, of the most extensive telephone service attainable. * * * It is sometimes argued that the presence of two telephone systems in a given district is a disadvantage to the community, which is best served by one system reaching all subscribers; but one system will never be made to reach all subscribers as cheaply as would otherwise be the case if the possibility of competition is destroyed.”

That telephone service must be furnished on the same terms to all subscribers similarly situated and without discrimination in the service is well stated in the case of *Pioneer Tel. & T. Co. v. State*, 45 Okla. 31, 144 Pac. 1060, as follows: “That the mutual rural district subscribers were organized mainly for a local service and convenience and for the accommodation of the farmers residing contiguous to such lines must be admitted, and the service should be furnished at a nominal price or at practically what it costs. The service for which the fee of fifteen cents is charged comes within the class designated as purely toll or long distance service. We see no reason why a man living in a town of a population of a few hundred, or a population of 2,000 or 3,000 in-

habitants should be required to pay for talking to a party residing in a town situated fifteen miles air line from an exchange, when a man similarly situated in a town of from 250 to 300 inhabitants engaged in a similar business should be permitted to talk to another town the same distance free. They both come within the long distance service. Neither is there any apparent reason why a party residing in a town situated seventeen miles air line from an exchange should be charged a message fee for talking to a party residing in another town similarly situated, when a party residing in a town situated fifteen miles from an exchange may talk free to a party residing in another town similarly situated, or vice versa. The expense of erecting, maintaining and operating is practically the same, and certainly the discrimination can not be justified on this ground; nor is the situation of the parties sufficiently different to warrant the distinction. We agree with the commission that no rule or regulation should be promulgated which in its most comprehensive interpretation would finally burden or impair the efficiency of the farmer or rural telephone subscribers. If the farmers' mutual lines are to be burdened with this class of commercial business, the effect will be to practically destroy the purpose for which the mutual rural lines were organized. In our judgment, the conclusion of the commission is, in effect, in conflict with its findings of fact, and is not supported by the evidence, but is contrary thereto, and that same should be reversed, with directions to enter an order requiring defendant, the Pioneer Telephone & Telegraph Company, to make such physical connections with the complainants' switchboard as will adequately and efficiently serve the needs of all concerned, and to further proceed in said matter not inconsistent with his opinion."

While a public utility rendering telephone service may not discriminate in doing so, and where a constitutional or statutory provision provides for the physical connection of telephone plants, an order of the state commission requiring this and providing rates for the service must be complied with by the company; the commission has no power to determine the correctness or to enforce the payment for such service, because this is a question to be disposed of by the parties directly or by the courts where they fail to agree or to pay the proper charge. This principle is established and discussed as follows in the case of *Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co.*, 143 Okla. 76, 291 Pac. 3, P. U. R. 1930D, 400, where the court said: "Since the adoption of the above provisions [Section 18, article 9]

of the constitution telephone companies operating in this state have been required to establish physical connection with other companies and to receive and transmit messages over each other's lines. * * * The makers of the constitution foresaw that rates agreed upon by the companies might not be for the best interest of the people, and for that reason the corporation commission was not only authorized, but was directed to fix rates. * * * The corporation commission, being charged with the responsibility of fixing rates, may determine, in a proper case, when an excess of rate has been collected and then order a refund of the excess collected, but, before it may exercise that jurisdiction, it must first fix a rate, and the determination of whether or not an excess of rate has been collected requires a determination of whether or not more has been collected than the rate authorized by the corporation commission to be collected. The corporation commission is without jurisdiction to determine that a connecting company has collected more than it agreed to charge in a contract made between it and the connecting company. That is a matter over which the corporation commission has no control, and can be adjusted only in a court having jurisdiction thereof. * * * Since the corporation commission has attempted to exercise a jurisdiction that it does not have to determine that the Poteau Company has received more than it agreed to receive in its contract with the Bell Telephone Company, the order is void, and, compliance with that order having been made a condition precedent to the enforcement of the remainder of the order, the Poteau Company was authorized to refuse to comply with the remainder of the order. This corporation commission of Oklahoma is as powerless to require a physical connection between the lines in Arkansas as it is to require the Poteau Company to pay the Bell Company any amount, where the corporation commission has not fixed a rate. It has no jurisdiction to make either order."

§ 701. **Collateral contracts.**—Questions of business policy and matters of business judgment belong to the public utility, which is permitted to exercise its discretion in deciding on what employees are necessary in conducting the business, on the best methods of switching, and in providing equipment necessary to render efficient service at reasonable rates; and contracts made with other companies for services and equipment will be sustained, unless the evidence shows that the payments made are wasteful and extravagant or that there has been an abuse of discretion by the company. The payment of a fixed percentage of

the gross receipts of the company, which is reasonable and necessary or desirable, in order to secure the best service, will be sustained by the courts, because they recognize that in the maintenance and operation of a public utility plant, the management must be permitted to use its business judgment in the exercise of its own discretion in the equipment, operation, and management generally of the plant. A telephone company may contract for equipment and the service of other companies by a purchasing or renting arrangement, which in their judgment is most advantageous, and such contracts will be sustained, unless it is shown that they are unfair or extravagant, or that there has been an abuse of discretion. These principles are established and fully discussed as follows in the case of *Northwestern Bell Tel. Co. v. Spillman*, 6 Fed. (2d) 663, P. U. R. 1926A, 330, where the court said: "The right to resort to that court does not exclude the right to review the decision of the Railway Commission by a suit of the nature of this one in this court. *Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Commission* (D. C.), 292 Fed. 139; *Pacific Tel. & Tel. Co. v. Cushman* (C. C. A.), 292 Fed. 930. * * * The first is the finding that the amount of four and one-half per cent of the gross revenue of the plaintiff, paid annually by the plaintiff to the American Telegraph & Telephone Company, in pursuance of a written contract, is a proper item of the plaintiff's expenses. The defendants have criticized this payment because the close relationship between the American Telegraph & Telephone Company and the plaintiff may overburden the plaintiff with an undue expense account for the benefit of the American Telegraph & Telephone Company. This subject and this danger have been considered in many other cases, and it has been held that such a relationship between the two companies may require a close scrutiny of the intercorporate dealings. But the final question in a case of this nature is not the possibility of over-reaching, nor the amount of scrutiny required, but whether in view of the facts, the expense item is or is not a proper one. That the American Telegraph & Telephone Company furnishes services and property to the plaintiff under his contract is not disputed, nor is there any real dispute that they are of substantial value. The presumption is that this contract was entered into in good faith and in the exercise of a proper discretion by the officers of both corporations. To overcome this presumption, it was incumbent on the defendants to show that the contract was not made in the exercise of a proper discretion by the plaintiff's officers. If it imposed an unreasonable charge upon the

plaintiff for the services and property to be furnished, that would be a strong circumstance to show that the amount paid was not paid as the result of the honest judgment of the plaintiff's officers, but, if the amount was fair and reasonable, it could not be omitted as a proper item of expense, simply because it was made to a corporation which might have dominated the action of the plaintiff's officers. * * * There was no substantial evidence offered on behalf of the defendants upon the question of the unreasonableness of this charge of four and one-half per cent of the gross annual earnings of the plaintiff. On behalf of the plaintiff, there was much testimony to support the rate of charge as less than the reasonable value for the services and property furnished under the contract. In this condition of the record, the defendant's exceptions to the master's allowance of this item can not be sustained. * * * It appears that this method of switching has passed the purely experimental period, has commended itself to telephone engineers, and, while the Omaha office is one of the first to attempt a trial of it on a large scale, it operates satisfactorily. The plaintiff is entitled to some latitude in adopting new methods, and, if the use of this equipment is a reasonable exercise of judgment by the plaintiff's officers, and not obviously wasteful, the item can not be disallowed. *S. W. Tel. Co. v. Pub. Ser. Comm.*, 262 U. S. 276, 43 Sup. Ct. 544, 67 L. ed. 981, 31 A. L. R. 807; *Consolidated Gas Co. of New York v. Newton* (D. C.), 267 Fed. 231. * * * The officers of the plaintiff must be allowed to exercise business judgment in deciding what employees are necessary to the conduct of the business and what is a reasonable compensation for them. There is no evidence of any abuse of discretion in these matters. * * * Upon the basis of the stipulated value of the plaintiff's property devoted to the service in question, and the further basis of the revenue and expenses as found by the master and herein approved, it is undisputed that the net return to the plaintiff on the property involved is, and will probably continue to be, less than five and one-half per cent per annum, and that, if the increases asked for by the plaintiff had been granted by the state railway commission, the rate of return would have probably been less than six and one-half per cent. In view of these facts, it does not seem necessary to determine whether or not seven and one-half per cent as a rate of return is confiscatory. The rates prescribed by the commission cause a rate of return much lower than the rate the master commends, a rate below that which the answer of the defendants admits is a fair rate, and one which,

in the light of the decisions, and of the testimony in this case, must be regarded as unreasonable and confiscatory. It results, from what has been said, that a decree must be entered enjoining the enforcement of the order of the state railway commission. * * * The making of rates is a legislative and not a judicial act. * * * A decree which should authorize the rates to be charged in the future would be clearly the exercise of legislative power and not a decision upon the validity of a rate which has been prescribed or adopted. The rates which are now in force are in force by acts of the plaintiff or by order of the state railway commission. * * * The court may not, in the face of this statute, grant the right to the plaintiff to change its rates generally, in order that it may earn a fixed per cent upon its investment. Rates that are in force may not be changed, unless application has been made to the commission for that purpose. Similar statutes have been held valid."

Contracts providing for the coordination of activities of different companies for the purpose of securing efficient, unified service, economical operation, and increased business will be upheld by the courts; and the commission will not be permitted to substitute its judgment for that of the company, unless there is evidence of bad faith or a clear abuse of the discretion of the company, which has the responsibility and is entitled to exercise the authority necessary in the management and operation of its plant. Contracts providing for a division of the receipts between local and long-distance companies which are fair and reasonable and have the approval of the commission will be upheld; and while past losses can not be considered for the purpose of enhancing the value of the property, neither may past profits be taken into account for the purpose of fixing rates that are confiscatory. This principle in its application, together with other matters necessary to reach a proper rate base and to fix a reasonable rate, are fully discussed as follows in the case of Illinois Bell Tel. Co. v. Moynihah, 38 Fed. (2d) 77, P. U. R. 1930B, 148, where the court said: "The commission did not make an investigation of the business of the American Company for the purpose of fixing rates for that company. If the position now taken by the city is correct, the method pursued by the commission is fundamentally erroneous, and its order is void. * * * The evidence shows a coordination of activities with a view to producing an efficient, unified service. The plan of organization, the ownership of property, and the method of operation show that the American and Illinois Companies functioned in distinct fields

of activity. * * * The Illinois Company is to be treated as the real plaintiff in this case. While agreements with the American Company, so far as they affect the question of confiscation, are to be scrutinized carefully, they are not to be rejected as shams; nor may findings of the commission as to what would be fair and reasonable contracts be substituted for them, unless it appears they were made in bad faith and as a device for unduly enhancing the earnings of the American Company at the expense of the Illinois Company. * * * The Illinois Company owns and operates all the property in the city of Chicago used in interstate calls, and connects with the property owned by the American Company at the city limits of Chicago. This part of the business of the Illinois Company is interstate commerce. * * * The separation of interstate from intrastate business is a difficult problem which the courts recognize and do not require exactness of proof. A separation made upon a reasonable basis will be approved, and this is particularly true where those opposing it adopt a purely negative attitude and offer no affirmative evidence. * * * This provision in the schedules and the method followed by the company in making the separation are in accord with the rulings of the courts and commissions which have considered this subject. * * * All these payments resulted in the Illinois Company retaining from forty-five to forty-nine per cent of the total gross of the originating long-distance tolls. * * * This division of the tolls appears to be fair and reasonable. * * * Divisions of rates are primarily a matter for the consideration of the interstate commerce commission and the state commission. We find no valid reason in the record before us for modifying the item of toll revenues. * * * It is not incumbent on plaintiff to show the cost of the services to the American Company. The test is the nature of the benefits received by plaintiff and whether or not it probably could have secured better terms elsewhere. * * * Accordingly, in determining the issue of confiscation, we shall make the allowance of \$1,364,000 found reasonable by the commission for operating expense on account of payments under the license contract. * * * The exclusion from the rate base of extensions and additions to the amount of \$26,000,000 paid for from the depreciation reserve was clearly erroneous. The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time it is being used for the public service. Constitutional protection against confiscation does not depend on the

source of the money used to purchase the property. * * * Past losses can not be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. And the law does not require the company to give up for future subscribers any part of the accumulations for past operations. Profits of the past can not be used to sustain confiscatory rates for the future. Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to the capital of the company. * * * Stress is placed upon the well-known facts concerning increase in labor and material costs during and after the World War, of which the court will take notice, and the increasing difficulties of construction which would have been met by a reproduction of the entire property under conditions existing in Chicago in 1923. Assuming the correctness of the 1911 inventory and appraisal and the accuracy of the company's books and conversion factors, we see no reason why the appraisal of June 30, 1923, does not furnish a reasonably accurate basis for determining a minimum reproduction cost. * * * The city's claim that there should be no allowance for going value can not be sustained on the record in this case. * * * The valuation of \$96,000,000 found by the commission, as of December 31, 1922, or \$106,000,000 as of June 30, 1923, if the net additions from January 1, 1923, to June 30, 1923, are added, is clearly insufficient, and shows that proper consideration was not given to the element of reproduction cost new. * * * This is a return of less than five and one-half per cent, and clearly confiscatory under conditions existing in 1923."

On appeal the court in this case under the title of *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 75 L. ed. 255, 51 Sup. Ct. 65, remanded it for further specific findings in accordance with the opinion, saying in part that: "The point of the appellant's contention is that the Western Electric Company, through the organization and control of the American Company, occupied a special position with particular advantages relative to the manufacture and sale of equipment to the licensees of the Bell System, including the Illinois Company, that is, that it was virtually the manufacturing department for that system, and the question is as to the net earnings of the Western Electric Company realized in that department and the extent to which, if at all, such profits figure in the estimates upon which the charge of confiscation is predicated. We think that there should be findings upon this point. * * * In view of the findings, both of the state com-

missions and of the court, we see no reason to doubt that valuable services were rendered by the American Company, but there should be specific findings by the statutory court with regard to the cost of these services to the American Company and the reasonable amount which should be allocated in this respect to the operating expenses of the intrastate business of the Illinois Company in the years covered by the decree."

Where the collateral contract is so closely connected with the valuation of the company or the cost of rendering its service that the cost of the equipment or service furnished under the collateral contract affects the cost and enters into the value of the service rendered by the local company, the court held that these are all proper matters for consideration on the question of the net earnings and rates, as is indicated in the case of Michigan Bell Tel. Co. v. Michigan Public Utilities Comm. (Fed.), P. U. R. 1931E, 222, where it was said: "It seems to me plain that the basic ground on which the Supreme Court, in its opinion * * * held that in a Bell System rate-case findings should be made relative to net earnings of the Western Electric Company and to the extent to which such net earnings figure in such a case was, and necessarily must have been, that if, as claimed by the defendants, the Western Electric Company be 'virtually the manufacturing department for that system,' it follows that, in determining the fair value of the property of the local Bell Telephone Company acquired from the Western Electric Company, the cost to the Western Electric Company of furnishing such property and the reasonable allocation thereof to such local company are proper matters for consideration, just as, in determining the effect of the payments of such local company to the American Company for the so-called 'license contract services' there should be specific findings * * * with regard to the cost of these services to the American Company and the reasonable amount which should be allocated in this respect to the 'local company'."

Talking sets or receivers and transmitters are necessary equipment in rendering telephone service and are frequently leased by operating companies and a fixed rental charged for their use. Under this arrangement title to the equipment is in the lessor, and it is not subject to local taxation where the lessor is a non-resident and local taxes are levied on property owned locally, for as the court said in the case of Hopkins v. Southern California Tel. Co., 275 U. S. 393, 72 L. ed. 329, 48 Sup. Ct. 180: "Talking sets are essential to the operation of any telephone system.

Those associated with instruments supplied by respondents are leased by them from the American Telephone & Telegraph Company, a New York corporation, which holds title thereto. * * * They alleged that these sets were not subject to local taxation; to disconnect them from respondents' systems would do irreparable harm; to enforce the demand for local taxes would violate rights guarantied by the Fourteenth Amendment; there was no adequate remedy at law through payment and suit to recover, or otherwise. And they asked for an injunction restraining the threatened wrong. * * * If payment of the prescribed part of the gross receipts only relieves from local taxation property actually owned and leaves all held under lease subject thereto, inequalities with possible confiscation, would certainly result. Under that theory a corporation with title to half (in value) of its operative property, the remainder being leased, would really pay on account of the portion owned at twice the rate required of another corporation operating the same amount of property and having equal receipts, but holding nothing by lease. And if the ratio between property owned and leased were less, the difference in rate would be still greater. A telephone company which leased everything it used would release no property from taxation by paying the gross receipts tax, while a competitor with equal receipts, by paying the same amount, might absolve from local assessment property of very large value. These difficulties can not be avoided by saying the lessee will not pay assessments against the lessor and therefore can not complain. Leases are commonly made with reference to taxation. When the lessor discharges the tax the lessee pays rent accordingly. And the Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment. * * * Without an authoritative holding by the state Supreme Court to the contrary, we must conclude the leased speaking sets are not subject to local taxation."

Where there is a community of interest because of common stock ownership between two public utilities, one of which supplied the product to the other for distribution to its customers, it is necessary for the commission or the court below to make a special finding of facts as to the proper rate base and the income received through a series of years before the court will be in a position to determine whether an ordinance fixing a rate for the service is unconstitutional because the rate fixed by the ordinance was unreasonable and resulted in the confiscation of property because of that fact; and in the absence of such find-

ings of fact, the court will remand the matter before attempting to pass upon the reasonableness of the rate provided for the local distributing company and for the producing company in supplying the product for distribution, as is indicated in the case of *Columbus Gas &c. Co. v. Columbus, Ohio*, 55 Fed. (2d) 56, P. U. R. 1932B, 4, where the court said: "Whatever might have been otherwise the case, it is clear that the opinion of the Supreme Court in the *Illinois Bell* case (1930), 282 U. S. 133, 162, 75 L. ed. 255, P. U. R. 1931A, 1, 51 Sup. Ct. 65, now requires that the record should contain testimony and findings as to the proper rate base and the actual return during each year of the three-year period while the fund was accumulating. We do not say that an ordinance, unconstitutional and invalid when passed, could become binding in a later year because during that year the rate of actual return increased; but the converse is clear from the *Illinois Bell* opinion and order. Such an ordinance may be valid when passed but may become invalid in a later year, or possibly in occasional later years, if it turns out to be in fact confiscatory in those later periods. A remand is necessary for this purpose, and as such proofs will include all that was sought by the bill of review, appeal No. 5491 becomes moot, and that bill should be dismissed by the court below without prejudice. * * *

In the order of reference to the master it was expressly provided that the master should first take proofs and consider the question of confiscation upon the basis of this contract cost to the companies at the city gate (sixty-five per cent of forty cents, being twenty-six cents), and that if upon that basis he found the ordinance nonconfiscatory, he should go no further, but if the ordinance should from this view be found confiscatory, he should then proceed to take proofs and report upon the issue as to the cost contract's validity and effect. The master having found and reported that the ordinance was not confiscatory upon the contract cost basis, took no action under the alternative direction. * * *

The extent to which the effect of such a cost contract may be limited by subsequent stock ownership community of interest, the extent and kind of community of interest which will make two corporations one for rate-making purposes, the limitations, if any, upon applying to natural gas production the rate-base principles established for manufacturing purposes—these and other questions ought to be decided upon a record which presented them concretely and not in the abstract. There is a further obvious complication, not to say difficulty, in using the cost

price as the basis for fixing the selling price when we find that the selling price is itself used as the basis of the cost price."

In order that the public service commission may determine and establish a reasonable rate for the service to be furnished by the public utility it must provide sufficient evidence of the cost of service including evidence as to the reasonableness of the charge of the holding company to the subsidiary company. This evidence must be furnished the commission so that it may determine the proper valuation and rate for the service before the company may resort to the courts. It is the duty of the commission to determine whether the price being paid for the product to the holding or producing company by the distributing company is reasonable before it attempts to fix a reasonable rate for the service of the distributing company, as is indicated in the case of *Western Distributing Co. v. Public Service Comm. of Kansas*, 58 Fed. (2d) 241, where the court said: "A public service commission such as the defendant is a rate-making body. In order that it may find and establish a legal rate it must have sufficient evidence upon which the same must be based. In my opinion it is the duty of a complaining utility such as the plaintiff to furnish sufficient evidence that the public utilities commission will have a basis upon which to make a reasonable rate. I think the question as to whether a public utility must exhaust its remedy before the commission before applying for judicial or injunctive relief is well settled. The legislature has within constitutional restrictions the power to place reasonable regulations upon public utilities, and the courts will not interfere with legislative regulation until it has been abused. Nor can the alleged abuse be anticipated. * * * The plaintiff argues that it was not required to produce all of its evidence before the public utilities commission, and strenuously argues that the principles enunciated in *Smith v. Illinois Bell Telephone Co.*, 283 U. S. 808, 51 Sup. Ct. 646, 75 L. ed. 1427, do not apply. With this contention I can not agree. It may be that the affiliated or holding companies, in this case, are making only a fair and reasonable charge for the service rendered by them or the commodity furnished. On the other hand, if the facts are ascertained it might appear that the affiliated or holding companies are being unjustly enriched by charges made on the subsidiary company. If a holding company were permitted to exact from a subsidiary company an excessive charge for service or commodity without a public service commission taking such charges into account in determining the proper rate, it would destroy any attempt of

the public service commission at regulation. * * * The cost of services rendered, the cost of commodities furnished, and rate of return earned by a holding or affiliated company is a material issue to be determined in a rate case, and at least a reasonably complete disclosure to the public service commission in respect thereto is necessary to enable findings to be made as to the reasonableness of payments made to an affiliated company for such services or commodities. A public utility has not exhausted its remedy before the public service commission until it has produced evidence upon which findings can be made upon all material issues affecting the rate. It is not proper for a public utility to withhold part of its evidence from the public service commission and first adduce it in the federal court in proceedings to enjoin the commission from interfering with the establishment of a new rate. It is my view, therefore, the Western Distributing Company, having failed to exhaust its remedy before the public service commission, is without standing to ask for relief in the courts and its amended bill of complaint herein should be dismissed. * * * Admittedly, the local body has no control over interstate rates as such. It is to be observed, however, that the parent company is not a party to this proceeding, either here or before the commission, and can not be affected by any action taken herein. The plaintiff, however, is asking the public service commission to base its local rate on the forty-cent wholesale rate. Therefore the defendant must require it to justify it and determine, as a fact in a proper proceeding, whether it is reasonable under all the conditions of the particular situation presented in Eldorado. To hold that the commission has no control over this item of plaintiff's rate structure would, in effect, nullify any regulation. * * * It can not be questioned that the forty-cent rate at the city gate is an interstate rate which the commission can not directly regulate. It does not follow, however, that the commission may not inquire into the reasonableness of that rate for the purpose of fixing the local rates which plaintiff may charge in the city of Eldorado. *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 51 Sup. Ct. 65, 75 L. ed. 255; *Houston v. Southwestern Bell Tel. Co.*, 259 U. S. 318, 42 Sup. Ct. 486, 66 L. ed. 961; *State of Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm.*, 262 U. S. 276, 43 Sup. Ct. 544, 67 L. ed. 981, 31 A. L. R. 807. It is my opinion that the commission, in making inquiry into the city gate rate, should not approach that question as it would were it empowered to fix such rate. The inquiry should be for the pur-

pose of determining whether the contract between plaintiff and the Cities Service Gas Company, an affiliated corporation, is fair and reasonable, and such as prudent business men, dealing at arms' length and acting in good faith, in the exercise of a sound discretion would have entered into under similar circumstances. To put it another way: The commission may not fix an interstate tax, but it may determine whether a corporation buying gas from a related and affiliated corporation is paying such affiliated corporation an unfair and fictitious charge, under the existing circumstances, for gas at the city gate, and using that charge as one of the elements of cost upon which it seeks to have the local rate fixed. The commission may make inquiry into value of property, costs, profits, limitation on source of supply, and other pertinent factors in determining whether, under the existing circumstances, the contract is fair and reasonable and was made in good faith; but it may not go to the extent of fixing and determining the rate at the city gate."

In an application for an increase of rates by a local company where the commodity is furnished to the local company for distribution by a nonresident concern, which is in practical effect one and the same organization, the cost of the commodity to the local distributing company is a proper item for investigation as to its reasonableness, especially where the two concerns are not dealing at arm's length. This is an interesting discussion and a practical application of the necessary limitation in the regulation and control of wholesale or parent companies which furnish service, supplies, or equipment to the local company, in all cases of rate regulations of local companies; and being the most recent decision on the subject by the Supreme Court of the United States, its further development and application will be of great interest and importance in the general field of utility regulation, for as the court said in the case of *Western Distributing Co. v. Public Service Commission*, — U. S. —, 76 L. ed. 655, 52 Sup. Ct. 283: "The appellees disclaim any intent to control rates charged for interstate service, but say that as the commission's function is to set reasonable rates for the intrastate service rendered by appellant in the city of Eldorado, this necessarily requires a determination of the question whether the price paid for the gas distributed is fair and reasonable. To this end the commission insists upon its authority to make such investigation as will satisfy it upon this point. Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that

the court below was right in holding that if appellant desired an increase of rates it was bound to offer satisfactory evidence with respect to all the cost which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction. The principles applicable in a rate investigation, where similar corporate relationship existed, were recently announced in *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 152, 153, 75 L. ed. 255, 265, 266, 51 Sup. Ct. 65, and no purpose would be served by repetition or elaboration of what was there said. * * * Where, however, they constitute but a single interest and involve the embarkation of the total capital in what is in effect one enterprise, the elements of double profit and of the reasonableness of inter-company charges must necessarily be the subject of inquiry and scrutiny before the question as to the lawfulness of the retail rate based thereon can be satisfactorily answered. * * * It is enough to say that in view of the relations of the parties and the power implicit therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition."

CHAPTER 28

REGULATIONS FOR RENDERING RADIO SERVICE¹

Section	Section
702. Federal regulation — Certificates.	704a. Public interest—Interference—Unnecessary service.
703. Issuance of certificates by commission—Orders.	704b. Violations of act.
704. Public interest, convenience, and necessity.	704c. Hearings of commission—Notice—Appeals.

§ 702. Federal regulation — Certificates.—Regulation of maintenance and operation of radio broadcasting service is in the federal radio commission, because such business is interstate, and is a form of interstate commerce. Transmission by radio is one of the greatest scientific achievements of all time and within the past decade has become one of the main factors of the civilized world and is increasing in importance almost incredibly. The conservation of its benefits for the general welfare is a most important service of the government. This service reaches in all directions over great distances throughout our states and into foreign countries, and bids soon to become world-wide in its scope. In 1912 the United States enacted a radio law for the regulation of this form of communication which required that licenses be obtained from the secretary of commerce for the privilege of rendering radio service and of operating the necessary apparatus for broadcasting. Fifteen years after the passage of this act, experience indicated its inadequacy, and the government found it necessary to remove various limitations and extend its authority in order that it might have the power to control matters of interference. This was accomplished by the Act of 1927,² which gave the federal government adequate control of all channels of radio transmission, established a license system for radio stations, divided the country into five zones, and created a radio commission whose duty it is to classify stations, regulate the service, assign wave lengths, regu-

¹ Cases involving telephone and radio service, see p. 1340, note 12. original section numbers of the act which appear in this chapter will be found in the history notes of the act.

² See Appendix, vol. 3, for references to the Radio Act of 1927. The

late and define the equipment in order to prevent interference, define station areas, and generally to regulate the service and chain broadcasting.

The commission has the authority and is charged with the duty of issuing licenses in order that public convenience and necessity may be properly served. These licenses are issued and so distributed that the public welfare will be served to the best advantage. The proper zones of frequency or wave lengths and periods for operation are fixed and determined. By amendment of the act the following year, these licenses are granted or renewed for terms of three months, and no license is issued without a waiver being signed of any claim or limitation against the power of the government to regulate the service. Licenses are issued or renewed only where they would serve public interest, convenience, or necessity, and only after a notice and hearing of the parties interested, with the right of appeal from the commission's orders denying licenses or renewals under which the court of appeals of the District of Columbia may sustain or revise the decision of the commission in accordance with the demands of justice. Channels for broadcasting were established and distributed covering this and adjoining countries and other nations. In determining whether the public interest and convenience justified the establishment of any particular station and channel of broadcasting, each station affected is entitled and expected to produce evidence showing ownership, investment, equipment, wave frequency, power and service, programs, operating expenses, interest in other stations, and a complete history of the station, and statement of the reasons why the license should be issued for the particular applicant. In establishing stations and allocating wave lengths, interference with other stations must be considered in order to avoid "cross-talk" or other interference between stations.

From the nature and extent of the service, radio broadcasting must be regulated by the federal government in the interest of the public welfare. And this must be done in connection with distant nations as well as with the adjoining countries. Radio transmission and reception is a new species of interstate commerce, consisting of aerial transmission of information and entertainment, all of which is intercourse, national if not world-wide in its extent, and while a part of broadcasting may not be for profit or business purposes, federal regulation and control of this as well as of commercial broadcasting for profit, and business purposes must be regulated and controlled by federal authority, because the one class of broadcasting service can not be

distinguished from the other for the purpose of regulation in the interest of the public welfare. Neither can interstate and intrastate business be separated for this purpose. As unregulated broadcasting would result in a national nuisance, and the regulative power must be co-extensive with the service, national regulation is necessary in the public interest; and the rights of individuals or local stations must submit to the general interest of the receiving public. "Public convenience, interest, or necessity," which is the basis of issuing licenses as the means of regulation, is given the same meaning, so far as conditions will permit, as their use in other fields of public utility service. These principles and an interesting discussion of the history of the development of the art of broadcasting by radio and of the power and necessity for national regulation of the business is fully and clearly discussed as follows in the case of *United States v. American Bond &c. Co.*, 31 Fed. (2d) 448: "The bill is for an injunction against radio broadcasting by the defendants without a federal license. It alleges that defendants who were refused a license by the radio commission threaten to operate a radio apparatus, for the transmission of energy in interstate and foreign commerce, in such a manner as to interfere with transmission and reception by others duly authorized thereto. Defendants answer and assert the invalidity of the Radio Act of 1927 (47 USCA, section 81 et seq.) and the order of the commission refusing the license. * * * In 1924, defendants constructed and commenced the operation of a station in Chicago under a license issued pursuant to the Radio Act of 1912 (USCA, sections 51-60). In 1927, in order to avoid interference with receiving sets in Chicago, defendants moved their station to Homewood, Ill., and consolidated with another station which was first licensed in 1925. The Homewood transmitter, operating under the call letters of WMBB-WOK, was built during the months of August and September, 1927, under a construction permit issued by the commission. On September 28, 1927, the commission issued a license to defendants authorizing them to operate the station for sixty days on a frequency of 1,190 kilocycles per second, and with a 5,000 watt power. This license was renewed from time to time for sixty-day periods. * * * After the hearing the application for renewal was denied and the license expired September 1, 1928. If the statute relied on is a valid exercise of the regulatory power over interstate and foreign commerce granted by the constitution, the right of the United States to invoke the remedy in equity here sought is clear. * * * The persons affected are numerous and widely

separated and their injuries severally may be small. The interference complained of amounts to a public nuisance and is within the jurisdiction of equity because of the irreparable damage to individuals and the great public injury which is likely to ensue. That the acts of the defendants may be violations of the criminal law also does not destroy the jurisdiction of equity. * * * Radio transmission is one of the great scientific achievements of all time. It has become one of the main factors in the life and civilization of the world. Its importance is increasing. The protection of the public in the enjoyment of its benefits is a most important function of government. Radio waves travel in all directions for great distances into other states and foreign countries. One may turn the dial of the receiver and hear sounds resulting from energy transmitted from widely separated places in the United States, Canada, and other countries. More than one station can transmit at the same time in the same geographical region (the extent of which depends upon the power used) only because radio waves having sufficiently different frequencies (wave lengths) can be detected separately to the exclusion of other waves by receiving apparatus. In the present state of the art, a difference of ten kilocycles is considered the smallest practical separation of frequencies. The frequencies or carrier waves thus separated are known as channels. There are ninety-six channels in the broadcast band set aside by the commission for use by broadcasting stations, extending from 550 to 1500 kilocycles (corresponding to wave lengths extending from 545.1 to 199.9 meters). A station transmits intelligibly for what may be called a service area, and causes interference with other stations operating on the same wave length in what may be called a nuisance area. A low-power station, even if it does not of itself transmit into other states, will cause interference with reception of other stations broadcasting on the same wave length into the state in which the low-power station is located.

"Radio, on account of its nature, early received national and international consideration. 24 Op. Attys. Gen. 1902, page 100; Treaty of Berlin, 37 Stat. 1565; Treaty of London, 38 Stat. 1672, 1707. The United States, to carry out the treaty provisions for avoiding interference, enacted the Radio Law of 1912. 37 Stat. 302 (47 USCA, sections 51-60). That act required licenses from the secretary of commerce for operation of all radio apparatus and made the licenses subject to the regulations contained in the act and all subsequent acts and treaties. The act was directed mainly to the problems then existing which had to do with radio telegraphy and not broadcasting, although the language

was broad enough to include radio telephony. As the number of radio stations increased, the courts found in the act limitations upon the authority of the government to deal adequately with questions of interference. *Hoover v. Intercity Radio Co.*, 286 Fed. 1003, 52 App. D. C. 339; *United States v. Zenith Radio Corporation* (D. C.), 12 Fed. (2d) 614. * * * On December 8, 1926, congress passed a joint resolution limiting license periods and requiring waiver of claims to wave lengths or the use of the ether as a condition precedent to licenses. 44 Stat. 917. On February 23, 1927, the Radio Act of 1927 was approved. 44 Stat. 1162 (47 USCA, section 81 et seq.). It asserts government control over all channels of radio transmission, provides a license system for radio stations and prohibits radio transmission, under penalty, except with a license in that behalf granted under the provisions of the act. For the purposes of the act the United States is divided into five zones, Illinois being in the fourth. A radio commission is created whose duty it is, from time to time, as public convenience, interest, or necessity requires, to classify stations, regulate nature of service, assign wave lengths, regulate apparatus, prevent interference, establish station areas, and regulate chain broadcasting. Section 4, 44 Stat. 1163 (47 USCA, section 84). By section 9 of the act (44 Stat. 1166) it is provided that the licensing authority, if public convenience, interest or necessity will be served, subject to the limitations of the act, shall grant licenses, and in so doing, when and in so far as there is demand for the same 'shall make such a distribution of licenses, bands of frequency or wave lengths, periods of time for operation, and of power among the different states and communities as to give fair, efficient, and equitable radio service to each of the same.' By amendment of March 28, 1928, 45 Stat. 373, section 3 (47 USCA, section 89, note), the term of licenses granted or renewed is limited to three months. * * * Section 10 of the act states the requirements of applications for license. 44 Stat. 1166 (47 USCA, section 90). In this connection it is to be noted that in an earlier section 5, 44 Stat. 1164 (47 USCA, section 8), it is provided that no station license shall be granted until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise. Section 11 of the act provides that if the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting of the license, it shall authorize the issuance, renewal or modification

thereof in accordance with such finding; if not, it notifies the applicant of a hearing 'under such rules and regulations' as it may prescribe. Each license is required to contain the statement that the license does not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein. 44 Stat. 1167 (47 USCA, section 91). Section 16 provides for appeal to the court of appeals of the District of Columbia from orders denying licenses or renewals and authorizes that court to hear additional evidence and to alter or revise the judgment of the commission and to enter such judgment as to it may seem just. 44 Stat. 1169 (47 USCA, section 96). Section 21 of the act provides for construction permits upon a finding of public convenience or necessity and for license to operate upon compliance with the provisions of the construction permit. 44 Stat. 1170 (47 USCA, section 101). * * * The commission adhered to the policy adopted by the department of commerce under the Act of 1912 and adhered to by governments of European nations and nations elsewhere in the world with reference to the channels allocated for broadcasting purposes. There were ninety-six of those channels. Six were set aside for the exclusive use of Canadian broadcasting stations. Eleven were set aside for simultaneous or share use by Canadian stations and stations located in the United States. The remaining waves were to be allocated among applicants in accordance with the provisions of the Radio Act. * * * All of the applications for licenses filed in the fourth zone in which defendant's station was located were produced. There were 196 such applications which stated as to each station ownership, investment, equipment, geographical location, time of operation, frequency, power, service, programs, public service, operating expenses, interest in other stations, history of stations and reasons why the granting of the application would be in the public interest. It appears that in allocating wave lengths, the interference of one station with another must be taken into consideration. There are two principal types of interference. One is called 'heterodyne' and manifests itself in the form of a disagreeable whistle of varying pitches which is reproduced by the receiving set. This results from interaction in the receiver of the carrier waves from two broadcasting stations operating on channels separated by too narrow a margin. Another type of interference is called 'cross-talk' and manifests itself by the reproduction simultaneously of two or more programs at once in the receiver in such a way that neither one

may be heard satisfactorily by persons listening to the receiver. A third type, which is known as 'blanketing,' is really an exaggerated form of 'cross-talk,' and results in the program of one broadcasting station being completely blotted out by the program of another station. In making allocations it is necessary to consider the 'service area' and 'nuisance area' of stations.

* * * In harmony with the plan provided in General Order 40, the commission, on August 31, 1928, denied the application of the defendants for a renewal of license. * * * It is apparent from the description of radio broadcasting which has been given heretofore that, if its benefits are to be enjoyed at all, it must be subjected to national regulation. Radio has been the subject of treaties, and the Act of 1912 was passed to enforce the provisions of the treaty of that year. In *Missouri v. Holland*, 252 U. S. 416, 40 Sup. Ct. 382, 64 L. ed. 641, 11 A. L. R. 984, the Supreme Court, upholding the validity of the Migratory Bird Act (16 USCA, section 703, et seq.), said: * * * 'It can be protected only by national action in concert with that of another power, * * *. We see nothing in the constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.' It does not seem to be open to question that radio transmission and reception among the states are interstate commerce. To be sure it is a new species of commerce. Nothing visible and tangible is transported. There is not even a wire, over which 'ideas, wishes, orders, and intelligence' are carried. A device in one state produces energy which reaches every part, however, small, of the space affected by its power. Other devices in that space respond to the energy thus transmitted. The joint action of the transmitter owned by one person and the receiver owned by another is essential to the result. But that result is the transmission of intelligence, ideas, and entertainment. It is intercourse, and that intercourse is commerce. * * *

"The suggestion that broadcasting which is not for profit is not commerce may be put aside as imposing an unwarranted limitation upon the power of congress. The broad scope of that power is set forth in the cases which are cited above. See, also, *Brooks v. United States*, 267 U. S. 432, 45 Sup. Ct. 345, 69 L. ed. 699, 37 A. L. R. 1407. But if the distinction had any real foundation, a large part of broadcasting is for the business purpose of advertising the broadcaster or the so-called program sponsors who buy broadcasting time. In view of the nature of broadcasting it would be utterly impossible to regulate and protect one class without bringing the other under the regulatory

authority. The contention that the act, in bringing the broadcasting stations themselves under national control, transcends the power of congress, overlooks the fundamental nature of this species of commerce. The transmission is brought about by concert of action on the part of broadcaster and receiver. The regulation is for the purpose, not only of protecting the broadcaster in his operations, but also for the purpose of promoting the interests of the public, who are obliged to submit to whatever is sent out for their reception.

"The authority of congress extends to every instrumentality or agency by which commerce is carried on, and the full control of congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. The execution by congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. *Simpson v. Shepard*, 230 U. S. 352, 399, 33 Sup. Ct. 729, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, and cases cited. The necessary limitation upon the number of stations, the interferences resulting from uncontrolled broadcasting in the same channel and the interests of the receiving public require that stations shall be classified, the nature of the service rendered by each class prescribed, wave lengths assigned, the location of stations determined, apparatus supervised—in short, that transmission be brought under a control which, instead of permitting the benefit to the public to be destroyed by conflict and confusion, will make it as great as possible. * * * The enforcement of uncompensated obedience to such a regulation is not an unconstitutional taking of property without compensation or without due process of law. * * *

"We are dealing with the constitutionality of a statute which requires a license and permits the commission, in apportioning licenses in a limited field, to exclude, in the public interest, an applicant, even though he may have been operating under a license. The act in this respect is well within the regulatory power of congress. The provisions of the act prescribed the only method by which order could be brought out of chaos and this form of interstate commerce saved from destruction. Any kind of regulation in a limited field necessarily includes the possibility that some may be excluded from the field. Unregulated broadcasting would create a national nuisance, and the

power of congress extends to the adoption of all measures reasonably necessary for its prevention. The rights of the individual broadcaster must give way to the paramount interest of the millions of the receiving public, who are entitled to have the waves sent out by broadcasting stations classified and arranged in such a way that the benefits resulting from this great scientific discovery may not be impaired or destroyed. * * * In the very nature of things, there can be no right to the use of any particular frequency or wave length, or of the ether as against legitimate exercise of the regulatory power of the United States. The provision of section 5 (47 USCA, section 85) requiring a waiver from applicants for licenses does not add anything to the regulatory power of the United States, nor can it be interpreted as a recognition of any right on the part of the broadcaster which he would have had, if he had not been forced to sign the waiver. Licenses under the Acts of 1912 or 1927, whatever their form or term may be, do not detract from the regulatory power of congress in the public interest. Thus regulatory power, like the police power of the state, can neither be abdicated nor bargained away. * * *

“Considering the nature of radio, the limitations of its field of operation, the history of radio regulation, the circumstances existing immediately prior to the passage of the Radio Act of 1927, the complex problems to be solved, and the purposes of the legislation, it must be held that the Radio Act of 1927 and its amendment of 1928 are appropriate and adapted to the ends sought, and specifically that the provisions regulating the number of broadcasting stations and licenses are also appropriate, adapted, and valid. * * * The words ‘public convenience, interest, or necessity,’ in which the standard is set forth, are taken from the field of public utility legislation, and are found frequently in statutes relating to the issuing of certificates or licenses for public utility construction and operation. The phrase is similar to the one found in paragraph 18 of section 1 of the Interstate Commerce Act, 41 Stat. 477 (49 USCA, section 1), in which the standard for issuing certificates by the interstate commerce commission for new or extended railroad construction or operation is set forth. * * * The act requires the commission to make equality of broadcasting service between the zones and the stations therein, to prevent interference, and to establish good service. The amendment of 1928 requires equality of broadcasting service between the zones to be established by granting or refusing licenses or renewals, changing periods of

time for operation, and increasing or decreasing station power, 'when applications are made for licenses or renewals of licenses.'

"The sufficiency of the words 'public convenience, interest, or necessity,' when read in their relation to the remainder of the act, to declare the policy of the law and fix the legal principles which are to control in given cases is shown by the following illustrative cases; *Mutual Film Corporation v. Industrial Commission*, 236 U. S. 230, 59 L. ed. 552, 35 Sup. Ct. 387, *supra*; *Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 396, 48 Sup. Ct. 348, 72 L. ed. 624; *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 12, 47 Sup. Ct. 1, 71 L. ed. 131; *Mabler v. Eby*, 264 U. S. 32, 44 Sup. Ct. 283, 68 L. ed. 549; *Douglas v. Noble*, 261 U. S. 165, 169, 43 Sup. Ct. 303, 67 L. ed. 590; *Inter-Mountain Rate Cases*, 234 U. S. 476, 486, 34 Sup. Ct. 986, 58 L. ed. 1408; *Red 'C' Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. ed. 240; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 30 Sup. Ct. 356, 54 L. ed. 435; *Union Bridge Co. v. United States*, 204 U. S. 364, 385, 27 Sup. Ct. 367, 51 L. ed. 523; *Lieberman v. Van De Carr*, 199 U. S. 552, 561, 562, 26 Sup. Ct. 144, 50 L. ed. 305; *Buttfield v. Stranahan*, 192 U. S. 470, 491, 493, 496, 24 Sup. Ct. 349, 48 L. ed. 525; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. ed. 725; *Field v. Clark*, 143 U. S. 649, 681, 693, 694, 12 Sup. Ct. 495, 36 L. ed. 294. The objections to the Radio Act of 1927 on the ground of unconstitutionality are not sustained. The conclusions stated by this court in *White v. Radio Commission*, 29 Fed. (2d) 113, are adhered to. * * * The defendants are still without a license. Their remedy is to have the action of the commission reviewed by the court which is given that jurisdiction by the act. This court has no jurisdiction to review the order of the commission. But it can not be said that the order of the commission is void. If the statute is valid, the commission, in refusing the license, was acting within its constitutional and statutory authority."

§ 703. Issuance of certificates by commission—Orders.—

An order of the radio commission, refusing an application for a renewal of a broadcasting license for the operation of a particular station at a definite power and frequency of wave lengths, and without limitation of time of operation, will be set aside by the court and the license ordered to be issued, where it appears that the particular station, requesting the renewal of the license, was one of the first to be established, that it had invested perhaps one and one-half million dollars, partly in experimenting and developing its business during the pioneer stages of broad-

casting, and that the station had developed and provided valuable apparatus and regular service of high character, because such a license would be in the interest of public convenience and necessity. This principle sustaining the right of a station under such conditions to continue to operate as before without time limit, in recognition of its efficiency and utility to the general public, is established and the reasons fully given for reversing the decision of the radio commission is furnished as follows in the case of *General Electric Co. v. Federal Radio Comm.*, 31 Fed. (2d) 630, P. U. R. 1929D, 321, where the court said: "These appeals are brought under section 16 of the Radio Act of 1927, 44 Stat. 1169 (47 USCA, section 96), for a review of a decision of the federal radio commission whereby the commission refused the application of appellant for a renewal of its broadcasting license, dated November 1, 1927, for the operation of station WGY, located at Schenectady, N. Y., with permission to use 50 KW power, at a frequency of 790 kilocycles, and without limitations as to time of operation. * * * The General Electric Company was first licensed to operate station WGY, on February 4, 1922, under the Act of 1912. The license was for three months; the power, 1,500 watts; the frequency, 832.8 kilocycles, corresponding to a wave length of 360 meters. Thereafter, during successive periods of three months each, the company applied for and was granted renewals of its licenses, each for the period of three months. By the renewal of May 21, 1923, it was assigned a frequency of 790 kilocycles, which it has had ever since, although at times the same frequency has been concurrently used by other licensed stations. The station power was gradually advanced by successive renewals from 1,500 watts to 50,000 watts, with greater power allowed for experimental purposes. On June 1, 1927, the first license issued to the company under the Act of 1927 was received by it. This license was for the period ending July 31, 1927, and granted a frequency of 790 kilocycles, the time to be shared with station WHAZ. On September 15, 1927 a renewal license was issued to the company for the term ending December 31, 1927, with the same frequency and power, but with unlimited time of operation. * * * Without such national regulation of radio, a condition of chaos in the air would follow, and this peculiar public utility, which possesses such incalculable value for the social, economical, and political welfare of the people, and for the service of the government, would become practically useless. Davis, *Law of Radio*, p. 71; Zollman, *Law of the Air*, pp. 102, 103. * * * The terms and conditions of the various licenses received and enjoyed by

appellant as herein recited also tend to confirm the view that, if the time limitation imposed by the commission upon WGY be reasonable and such as to serve the public convenience, interest, or necessity, the order should be sustained; otherwise, it should be overruled. Upon this point, however, we feel that the contention of the appellant should be sustained. It appears that station WGY represents a large investment of capital, said to be \$1,500,000, adventured in part during the pioneer stages of broadcasting, and that the station has been one of the most important development stations in the country; that through its enterprise important and valuable apparatus has been developed, which has greatly advanced the art of broadcasting; that it has been one of three stations recognized in this country as 'development broadcasting stations'; and that at present it carries on great experimental work of this character in the public interest. It appears that within 100 miles of the station there is a very large population, both urban and rural, estimated to number more than 2,000,000 persons, residing in the states of New York, Massachusetts, Vermont, and New Hampshire, who in large part are dependent upon this station for reliable and regular broadcasting service, and that, if the station should be silenced during the early hours of the evening, as determined by the commission, the general public within this territory would be seriously prejudiced. In view of the service to the art hitherto rendered by WGY, and still continued by it, with the resulting advantage to the public, and in view, also, of the 'public convenience, interest, and necessity' of so great a constituency for full-time operation of the station, it appears that the restriction complained of is not reasonable and should not be enforced. * * *

We are convinced that the public interest would be enhanced by granting full time to the latter station. It is the judgment of this court, therefore, that the appellant, the General Electric Company, was on November 11, 1928, and is now, entitled to receive from the federal radio commission a renewal of its license to operate station WGY upon the same terms as those contained in the license dated November 1, 1928, to wit, upon 790 kilocycles, with power of 50 KW, and without time limit for operation, and this cause is remanded to the federal radio commission to carry this judgment into effect."

An order of the radio commission denying further time for the completion of a station will be reversed and the permission granted by the court, where it appears that the applicant acted in good faith and exercised due diligence to complete the construction of the station within the allotted time, and that it was

not possible to do so because of factors not under its control, especially where a substantial investment has been made, which would be lost, since the public interests have not suffered by reason of the delay, and the operation of the station would be in the public interest, for as the court said in the case of *Richmond Development Corp. v. Federal Radio Comm.*, 35 Fed. (2d) 883: "Application of Richmond Development Corporation for an extension of time for the construction of a radio broadcasting station was denied by the federal radio commission, and applicant appeals. Reversed and remanded. * * * It required that construction of the station should be commenced at once, and should be completed by May 31, 1928. It is provided by section 21 of the Radio Act of 1927, 44 Stat. 1162 (47 USCA, section 101), that such a permit becomes automatically forfeited if the station is not ready for operation within the time specified in the permit, or within such further time as the licensing authority may allow, unless prevented by causes not under the control of the grantee. * * * On June 1 the commission extended the time until July 1, and afterwards granted a second extension until September 1. The uncontradicted evidence is to the effect that during this time appellant was making diligent efforts to complete the station within the specified time, but owing to delays caused by contractors, by engineering difficulties, and by weather conditions, construction was not completed by September 1. On September 15 the appellant applied to the commission for an extension of time until October 31 for the completion of the station. * * * We are convinced by a review of the record that it was the duty of the commission to grant the application. The evidence, without substantial contradiction, discloses that the applicant had acted, not only in good faith, but also with diligence, in its efforts to construct the station within the time allowed by the permit, and that the completion thereof was prevented by causes not under its control. * * * The evidence discloses that prior to September 1 appellant had expended about \$7,000 in the erection of buildings for the station, and had incurred expenses sufficient to increase its total expenditures to more than \$30,000. If appellant is denied the privilege of completing the station, it will suffer a heavy loss in consequence. On the other hand, it can not be contended that the public interests have suffered any loss or prejudice by reason of the delay in the completion of the station, and, if allowed to proceed with the construction, appellant agrees 'to make every human effort to push it through to the earliest possible completion.' Furthermore, in our opinion, the record dis-

closes no cause or circumstance arising or first coming to the knowledge of the commission since the granting of the permit which would make the operation of such station against the public interest."

An order of the radio commission denying a station the right to operate for full time, and requiring it to share time equally with another station in the same locality, will be sustained in the interest of the general public, and in fairness to the other station, although the applicant is a municipal corporation, because in maintaining and operating a radio station, it exercises its private and not its governmental powers and is equally subject to federal regulation and control with privately-owned stations. This principle is established and discussed as follows in the case of *New York, New York v. Federal Radio Comm.*, 36 Fed. (2d) 115, 59 App. D. C. 129, where the court spoke as follows: "This is an appeal from an order of the federal radio commission denying appellant's application for a modification of its existing station license. The controversy relates to an order of the commission whereby appellant's radio broadcasting station was denied the right to operate for full time, and was required to 'share time' equally with station WMCA. It appears that in the year 1924 a license was granted by the secretary of commerce, under the Radio Act of 1912, 37 Stat. 302 (47 USCA, sections 51-60), granting permission to the city of New York to operate a radio broadcasting station in that city. The license was for three months, the call letters were WNYC, the frequency was 570 kilocycles, and the station was to be allowed full and unlimited time of operation. This license was renewed from time to time by the secretary of commerce and the federal radio commission respectively, upon the same terms, until in the year 1928. The commission then made a revised allocation of all the broadcasting stations in the country, as to their frequencies, power, and time of operation. As part of this revision station WNYC was given the same frequency as before, but was denied full-time operation, and was required to share time equally with station WMCA. The latter station had its studio in New York and its transmitter in New Jersey, and operated at the same frequency as station WNYC. Pursuant to this assignment the commission issued a renewal license to appellant, subject to the condition that it share time with WMCA. Appellant thereupon applied for a modification of this license, and requested that station WNYC be given unlimited time of operation, as before. The application was duly heard by the commission after notice to appellant and to station WMCA, both of whom appeared and

submitted evidence and arguments. The commission thereupon decided that public interest, convenience, and necessity required that operating time should be equally divided between the two stations as provided by the license, and accordingly overruled the application. This appeal was then taken under section 16 of the Radio Act of 1927, 44 Stat. 1169 (47 USCA, section 96).

* * *

"In our opinion the interstate broadcasting of radio communications is a species of interstate commerce, and as such is subject to federal regulation. *Whitehurst v. Grimes* (D. C.), 21 Fed. (2d) 787; *United States v. American Bond & Mortgage Co.* (D. C.), 31 Fed. (2d) 448; Davis, *Law of Radio*, 71; Zollman, *Law of the Air*, 102, 103. In the exercise of this authority congress has imposed upon the federal radio commission the duty of classifying radio stations, of assigning bands of frequency to the various classes of stations and for each individual station, and of determining the power which each station shall use and the time during which it may operate. Section 4 (a) and (c), Radio Act of 1927 [47 USCA, section 84 (a) and (c)]. This regulation must deal with the broadcasting system as a whole, of which each station is only a unit, and must have as its purpose the promotion of the public interest, convenience, and necessity. It is manifest that in the performance of this duty the commission must at times limit the operation of some of the stations in the public interest. The appellant's rights, like those of other stations, are made subject to this authority by the statute, and also by the express terms of its license. Appellant contends that the commission lacks authority to prohibit the full-time operation of station WNYC because appellant is a municipal corporation and the operation of the station is a governmental function.

"This contention can not be sustained. It is true that appellant is a municipal corporation, but in the operation of its radio station it exercises private, and not governmental powers, and accordingly is not acting as a municipal corporation but as a corporate legal individual. *Vilas v. Manila*, 220 U. S. 345, 356, 31 Sup. Ct. 416, 55 L. ed. 491; 43 C. J. 182, 183. Moreover, even if station WNYC is partly used for governmental purposes, the use is nevertheless subject to the regulatory control exercised over the national broadcasting system which is vested by statute in the federal radio commission. *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. ed. 719; *Illinois Central R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. ed. 107; *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 28 Sup. Ct.

121, 52 L. ed. 230; Kansas City Southern Ry. Co. v. Kaw Valley Drainage District, 233 U. S. 75, 34 Sup. Ct. 564, 58 L. ed. 857.

* * * The commission found that under the revised allocation of stations it was impracticable to grant the application of station WNYC for full operating time without the complete elimination of station WMCA. The latter station serves the same public as the former, and has won the public esteem by the high character of its service. It is believed that the stations may without substantial prejudice severally continue their public service under the present arrangement."

An order of the radio commission denying a license renewal for portable broadcasting stations will be sustained because it is difficult, if not impossible, to regulate such stations and to prevent their interference with other established stations, which are permanent and substantial and proper subjects of regulation. This principle is established, and the reasons for it are given as follows in the case of Carrell v. Federal Radio Comm., 36 Fed. (2d) 117: "This is an appeal from certain orders of the federal radio commission refusing to renew the licenses of three so-called portable broadcasting stations, namely, WKBG, WIBJ, and WHBM, owned and operated by the appellant. A portable broadcasting station is one which is migratory in character, not being restricted to any single permanent location when in operation, but permitted to operate at any place or places to which its transmitting equipment may be transported by the licensee. The appeal is taken under section 16 of the Radio Act of 1927, 44 Stat. 1169 (47 USCA, section 96). The stations now in question were first licensed to operate by the secretary of commerce in the year 1925, under the Radio Act of 1912 (37 Stat. 302), as amended (47 USCA, sections 51-60), and they continued to operate under licenses and extensions thereof granted severally by the secretary of commerce, and the federal radio commission, until July 1, 1928. The license under which the stations operated were for varying periods of time, none of which exceeded three months in duration. On April 26, 1927, the commission issued an order entitled General Order No. 6, giving public notice that broadcasting licenses would not thereafter be granted, except for very limited periods, unless the application therefor specified a permanent location for the station's transmitter. On May 10, 1928, the commission issued its General Order No. 30, as follows: 'It is hereby ordered by the federal radio commission that no license or renewal or extension of existing licenses will be issued to portable broadcasting stations after July 1, 1928, and on that date all portable broadcasting

stations will cease operations.' The existing licenses of all such stations were extended by a subsequent order until July 1, 1928, when they were to expire as provided by the preceding order. * * * The commission thereupon announced that, upon examination of the application, it had not determined that public interest, convenience, or necessity would be served by the granting thereof. The renewals thus applied for were accordingly refused and the present appeal was taken. * * *

"It may be stated at once that no complaint is made as to the conduct of appellant in the operation of the stations now in question. The ruling of the commission relates to all portable stations alike, and this appeal challenges the authority of the commission to make and enforce its rule against the licensing of portable broadcasting stations as a class. It is contended on behalf of the commission that the licensing of portable broadcasting stations is not in the public interest, convenience, or necessity; that the Davis Amendment to the Radio Act of 1927 (45 Stat. 373) contemplates fixed allocation of broadcasting stations, and its mandate can not be carried out if roving transmitters are allowed to operate; that under the allocation of stations as at present established the operation of migratory transmitters would result in harmful interference; that the difficulties of supervision of portable stations render it against public interest to license them; and that to permit portable broadcasting stations to rove at will over a portion of the country on any one broadcasting channel would deprive the public of the service of that channel to its full capacity. We think that the commission acted within its authority when dealing with portable stations as a class, under the provisions of section 4 of the Radio Act of 1927 [47 USCA, section 84 (f)], reading in part as follows: 'Except as otherwise provided in the act, the commission, from time to time, as public convenience, interest, or necessity requires, shall—(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act.' We think also, that the objections urged against the licensing of portable stations as a class are fully sustained by the evidence. Moreover, it is within common knowledge that, if portable transmitters were licensed to roam over the country at the will of the licensees, great inconvenience would result because of interference with established stations, and the difficulty of supervising the broadcasting service as a whole would be greatly increased. It is obvious that these inconveniences need not be incurred at the present stage of the art, since adequate service

may be expected from stations having fixed locations, and the development of broadcasting in this country has tended exclusively toward localized stations."

§ 704. **Public interest, convenience, and necessity.**—Where a number of applications for the renewal of licenses to operate radio stations in the same locality are to be determined, the radio commission has the power, in its discretion, to divide the time or deny altogether any license in the interest of the general public and for the purpose of securing the best and most substantial service available in the particular territory, for as the court said in the case of *Great Lakes Broadcasting Co. v. Federal Radio Comm.*, 37 Fed. (2d) 993: "The applications in question represent competitive claims of the three appellant broadcasting stations for operating time on the same broadcasting channel. The first station in question is WENR, located at Chicago, and owned and operated by appellant, the Great Lakes Broadcasting Company. The company is owned and managed by an association of public utility corporations, and has been operating under successive federal licenses since 1925. The station was organized and has been conducted as a general service public station for broadcasting good music, entertainment of various kinds, educational features, and news. It ranks in point of material equipment with the foremost stations in the country. In August, 1928, with the permission of the federal commission, it procured a new transmitter capable of employing 50,000 watts power. The cost of the station exceeded \$450,000. Its programs have been uniformly excellent and popular, and in recent years it has expended more than \$300,000 a year in operation. Prior to November 11, 1928, the station was operated on a frequency of 1,040 kilocycles. * * * The station was operated full time each day. The second station is WCBD, which is owned and operated by Wilbur Glenn Voliva. It is located at Zion, a city with a population of about 6,000, located forty miles north of the business center of Chicago. It has operated under license since 1924. The station is operated in the interest of the religious denomination upon which the city of Zion is founded, and its programs are based upon the religious exercises in the Zion Temple, and include the sermons of the leader of the sect. The choir of the church furnishes the music broadcast by the station. The investment and expenses of WCBD are not so great as those of the other stations, but the programs are of a high character, and are popular with a large class of people, regardless of religious affiliations. The third station is WLS, owned and operated

by the Agricultural Broadcasting Company, a corporation located in Chicago. This station was established by federal license in the year 1924, by Sears-Roebuck & Company, a large mail order concern with headquarters at Chicago. In November, 1928, the station was taken over by the present owner, with the consent of the federal radio commission. The capital stock of the corporation is owned in part by the Prairie-Farmer Publishing Company, and in part by Sears-Roebuck & Company. Prior to November 11, 1928, WLS operated upon a frequency of 870 kilocycles, by use of a transmitter having a capacity of 5,000 watts. This channel was a cleared channel, and the operating time upon it was shared by WLS and WCBD, in the proportion roughly of five-sevenths time to WLS and two-sevenths time to WCBD. The programs broadcast by WLS were of high character and general interest. They were of especial importance to farmers and stockmen. The station continuously sent out valuable reports upon agricultural and allied subjects, which were of service to a large class of listeners. The station has an efficient equipment. * * *

"The four acting members unanimously decided against the application of WLS for the entire operating time upon the channel in question. Two of the four voted for, and two against, the application of WENR for equal time with WLS upon the channel. Two voted in favor of restoring WCBD to its former frequency, but limiting it to one-seventh time only, and of transferring WENR to a frequency of 1,480 kilocycles; and two members voted against these proposals. Accordingly none of the applications received a majority vote of the commissioners, and therefore each was denied. The three applicants then appealed severally to this court under section 16 of the Radio Act of 1927, 44 Stat. 1162 (47 USCA, section 96). It is provided by that section that upon such an appeal 'the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just.'

"The controversy before us therefore relates to the disposition made by the commission of the operating time on the channel of 870 kilocycles, and requires us to decide whether such operating time should be granted exclusively to WLS, or divided between WLS and WENR either equally or in proportions of five-sevenths to WLS and two-sevenths to WENR, or whether the entire operating time should be divided among the three stations in certain proportions yet to be determined. It is our opinion that WCBD's application was rightly denied. This

conclusion is based upon the comparatively limited public service rendered by the station, and the fact that its present assignment is not unreasonable. Moreover, the full operating time of the channel in question is not more than sufficient to serve the requirements of WLS and WENR, both of which, so far as the present record discloses, must continue to operate upon it. We are of the opinion also that the operating time upon this channel should be shared equally by WLS and WENR. We base this opinion upon a consideration of the excellent service heretofore rendered to the public by WENR, and its capacity for increased service; also its large expenditures for meritorious programs for public instruction and entertainment, and the popularity of the station; also its ability by means of its 50,000 watt transmitter to cover a large area; and the assured financial responsibility behind it. It is manifest also that an allowance of only two-sevenths time for broadcasting is totally inadequate for the economical operation of such a station. Under these circumstances, it is contrary to justice, and against public convenience, interest, and necessity, to apportion the operating time in the proportion of two-sevenths to WENR and five-sevenths to WLS.

* * * The commission found itself constrained by existing conditions to assign the two stations to the same channel, and the operating time should be divided justly between them. We are convinced, furthermore, that the farming community will not be prejudiced by such a division, inasmuch as WENR likewise broadcasts agricultural news as part of its program, and WLS will continue to broadcast for one-half of the time."

Broadcasting radio stations, having large investments and making substantial improvements and meeting current operating expenditures, will be sustained in their right to continue to render broadcasting services, as against a station less efficient in its equipment and operation, where because of the proximity in the location of the stations, a division of time is necessary, because it is the duty of the radio commission to secure the best service available in any locality in the interest of the public service. This principle is established and discussed as follows in the case of *Chicago Federation of Labor v. Federal Radio Comm.*, 41 Fed. (2d) 422: "Appeal from an order of the federal radio commission denying an application of the Chicago Federation of Labor for a modification of the broadcasting license of station WCFL. * * * In October, 1928, the station filed an application for a modification of its license whereby its frequency should be changed from 970 kilocycles to 770 kilocycles, its power increased from 1,500 watts to 25,000 watts, and un-

limited time of operation should be granted to it. The application was heard upon evidence by the commission and was overruled. The present appeal from that ruling was taken under section 16, Radio Act of 1927, 44 Stat. 1162 (47 USCA, section 96). It appears from the record that frequency 770 kilocycles, which appellant is applying for in this proceeding, is a cleared channel allocated by the commission to the fourth zone. * * * It is manifest that if the frequency in controversy, to wit, 770 kilocycles, be granted to station WCFL for full-time operation as contended for by that station, it means that stations WBBM and KFAB shall be denied the use of the frequency which they have hitherto enjoyed, without being given any substitute therefor in this proceeding. In the present overcrowded condition of the broadcast band, and in view of the fact that the fourth zone already enjoys more than its proportionate share of cleared channels, the result would be that these two stations would be deprived of the broadcasting privileges now enjoyed by them, with but little hope for improvement in the future.

"The record discloses that station WBBM is an entirely independent station, representing an investment of \$150,000, and expending approximately \$300,000 a year for operating expenses. It began broadcasting in November, 1923, and has in all respects and at all times scrupulously obeyed the law and rules governing broadcasting. It has always rendered and continues to render admirable public service. The station has consistently furnished equal broadcasting facilities to all classes in the community, and has won the favor and esteem of the public. Its commendable career entitles it to consideration. The career of station KFAB is equally meritorious. The past record of station WCFL has not been above criticism. * * * The question arises whether under these circumstances the public convenience, interest, or necessity would best be subserved by granting the frequency in question to WCFL at the expense of the other two stations, or by leaving the three stations without change in the possession of the privileges which they have hitherto enjoyed. The commission decided to adopt the latter course, and in our opinion this was the correct decision. It is not consistent with true public convenience, interest, or necessity, that meritorious stations like WBBM and KFAB should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if

the licenses of established stations should arbitrarily be withdrawn from them, and appropriated to the use of other stations. * * * It is assigned as error that the commission required appellant to designate a single frequency in its application for modification of its license, whereby the proceeding was virtually converted into a contest with stations WBBM and KFAB as to the use of that frequency. In our opinion this procedure was not erroneous."

Since the decisions of the radio commission are presumed to be just and to best serve the public interest, convenience and necessity, the court will not reverse its findings except in cases where it clearly appears to be contrary to the evidence, for as the court said in the case of *Marquette University v. Federal Radio Comm.*, 47 Fed. (2d) 406: "This reallocation was made with a view of giving a degree of permanent organization to the broadcasting system, and also of reducing interference. Under this reallocation the station WHAD was awarded one-seventh time on a frequency of 1,120 kilocycles with 250 watts power. On December 3, 1929, appellant applied for a modification of this assignment, requesting the use of a frequency of 900 kilocycles with 500 watts power, and for hours similar to the present, but with more flexibility for special broadcasts. From the denial of this application the present appeal is prosecuted. The case turns solely upon a question of fact, and, inasmuch as the commission is vested with authority to regulate the licensing of broadcasting stations in such a manner as to best subserve public interest, convenience, and necessity, the court will hesitate to set aside a finding of the commission unless it appears to be manifestly contrary to the evidence. *Technical Radio Laboratory v. Federal Radio Commission*, 59 App. D. C. 125, 36 Fed. (2d) 111, 66 A. L. R. 1355. A careful review of the record in this case convinces us that the action of the commission in denying appellant's application and sustaining its original allocation is fully justified by the evidence. It is therefore unnecessary to review the testimony for the purposes of this case."

A decision of the radio commission will be sustained where the renewal of a license was denied to a physician, who was conducting the station for his own personal interest and prescribing treatment for patients whom he never saw on a diagnosis from symptoms stated in a letter of the patient, because this is against the public health and safety, and not in the public interest. In establishing the principle that in the operation of broadcasting stations, the public welfare and interest is para-

mount, and that operators will not be permitted to consume a large part of their time on matters of a distinctly private nature, which are uninteresting and distasteful to the public, the court spoke as follows in the case of KFKB Broadcasting Assn. v. Federal Radio Comm., 47 Fed. (2d) 670: "In its 'Facts and Grounds for Decision,' the commission held 'that the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest'; that 'the testimony in this case shows conclusively that the operation of station KFKB is conducted only in the personal interest of Dr. John R. Brinkley. While it is to be expected that a licensee of a radio broadcasting station will receive some remuneration for serving the public with radio programs, at the same time the interest of the listening public is paramount, and may not be subordinated to the interests of the station licensee.' * * * In considering an application for a renewal of the license, an important consideration is the past conduct of the applicant, for 'by their fruits ye shall know them.' Matt. VII:20. Especially is this true in a case like the present, where the evidence clearly justifies the conclusion that the future conduct of the station will not differ from the past. In its Second Annual Report (1928), p. 169, the commission cautioned broadcasters 'who consume much of the valuable time allotted to them under their licenses in matters of a distinctly private nature which are not only uninteresting, but also distasteful to the listening public.' When congress provided that the question whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character. Obviously, there is no room in the broadcast band for every business or school of thought. In the present case, while the evidence shows that much of appellant's programs is entertaining and unobjectionable in character, the finding of the commission that the station 'is conducted only in the personal interest of Dr. John R. Brinkley' is not 'manifestly against the evidence.' We are further of the view that there is substantial evidence in support of the finding of the commission that the 'medical question box' as conducted by Dr. Brinkley 'is inimical to the public health and safety,' and for that reason is not in the public interest. * * * We are asked upon the

record and evidence before the commission to substitute our judgment and discretion for that of the commission. While section 16 of the Radio Act of 1927 (44 Stat. 1162, 1169, U. S. C., Supp. 3, tit. 47, section 96) authorized an appeal to this court, we do not think it was the intent of congress that we should disturb the action of the commission in a case like the present."

§ 704a. Public interest—Interference—Unnecessary service.
—An application for an increase of power and a change of frequency for the operation of a broadcasting station is properly denied where it appears that, if granted, it would result in creating substantial interference with a number of other established stations, the court holding that the granting of such an application would not be in the public interest, convenience or necessity. This principle is established and discussed as follows in the case of *Reading Broadcasting Co. v. Federal Radio Comm.*, 48 Fed. (2d) 458, where the court said: "Application by the Reading Broadcasting Company for an increase of power and a change of frequency for the operation of its broadcasting station, in which proceeding the Journal Company, owner of broadcasting station WTMJ of Milwaukee, Wis., intervened. From a decision of the federal radio commission refusing the application, applicant appeals. * * * A hearing was duly held upon the application, at which, broadcasting station WTMJ of Milwaukee, Wisconsin, was allowed to intervene. The commission thereupon held that the public interest, convenience, or necessity would not be served by granting the application. It was accordingly refused, and the present appeal was taken under section 16 of the Radio Act of 1927, 44 Stat. 1162, 1169 (47 USCA, section 96). The board found upon the evidence that station WRAW as now operating is doing a good local broadcasting service, although, owing to peculiar geographical conditions, its service area is somewhat restricted; but that its service in Reading and the neighborhood could be increased by approximately 600 per cent by an improvement in the transmission of the present station, producing 100 per cent modulation without changing its power or frequency. The board found moreover that the service area of the station is well served by station WJZ located at New York City, and other high-powered radio stations. The board also found that, if appellant's station should be permitted to operate upon a frequency of 620 kilocycles, with power output of 500 watts, as proposed in the application, it would result in heterodyne interference with station WLBZ located at Bangor, Maine, about 470 miles from Reading, operating upon a 620-kilocycle channel with

500 watts power, and likewise with station WTMJ, located at Milwaukee, Wis., about 675 mile from Reading, operating upon a 620-kilocycle frequency, with power of one kilowatt at night-time and two and one-half kilowatts in the daytime, and would thereby reduce the service areas of those stations; also that it would interfere with the service of stations WFAN and WIP, located at the city of Philadelphia, about fifty miles distant from Reading, one operating upon a 620-kilocycle channel, the other upon a 610-kilocycle channel, by producing cross-talk on both of these channels. We have examined the evidence contained in the record, and we think it sufficiently sustains these findings.

* * * We concur in these views, for it would not be consistent with the legislative policy to equalize the comparative broadcasting facilities of the various states or zones by unnecessarily injuring stations already established which are rendering valuable service to their natural service areas. The paramount consideration after all is the public interest, convenience, and necessity, and we are convinced upon a review of the record that the board's conclusions are in line therewith."

Where a request for additional power privileges which are unnecessary in rendering its present public service and for an increase in the service involves the rights of other radio stations and the best interests of the general public served by them, the refusal of such a request will be sustained by the courts, especially where the increase would grant an overquota and is not necessary to the continued service, for as the court said in the case of *Durham Life Ins. Co. v. Federal Radio Comm.*, 55 Fed. (2d) 537: "The record discloses that the state of North Carolina is situated within the third zone as defined by the statute, and that this zone is overquota to the extent of 9.59 units, which is about eleven per cent in excess of its normal allocation. It discloses also that the state of North Carolina is underquota by 1.01 units as compared with the other states within the third zone, but, if allotted the increase now requested it would be 0.47 unit overquota as compared with them. * * * Such increase, however, is not necessary to enable the station to render the same public service as heretofore, for its application is designed solely for the purpose of increasing its service area. The present issue therefore is not whether the station shall suffer the loss of any facility heretofore allotted to it, but whether it shall be granted an additional facility not heretofore possessed by it. * * * In our opinion this decision is not contrary to law, nor is it arbitrary or capricious. It is true that the increase of

power requested by appellant would subserve the public convenience and interest of the people residing in the additional area which would be better served thereby. But the commission must take into consideration the public convenience, interest, and necessity of the radio service of the entire country, of which appellant's station and its service area are but a part."

A decision of the radio commission, denying an application which would permit of the location of three broadcasting stations in the same territory, operating at the same time with only a thirty-kilocycle separation between them, will be sustained by the court, because this does not provide a sufficient separation to prevent interference in the service. This principle is established in the case of *General Broadcasting System v. Federal Radio Comm.*, 47 Fed. (2d) 426, where the court said: "The question at issue is one of fact, which the commission has decided after hearing all of the evidence. The present appeal calls upon this court to determine whether the decision is manifestly against the evidence. If so, it should be reversed; if not, it should be affirmed. *Technical Radio Laboratory v. Federal Radio Commission*, 59 App. D. C. 125, 36 Fed. (2d) 111, 66 A. L. R. 1355. A review of the record convinces us that the decision is not against the evidence. If appellant's application is granted it will result in locating three broadcasting stations at practically the same geographical position, and permitting them to operate simultaneously with only a 30-kilocycle separation between them. Experience has demonstrated that in general this is not a sufficient separation."

§ 704b. *Violations of act.*—In affirming a conviction on an indictment charging the use of profane language, the court sustained the principle that the 1927 Act prohibits the use of profane language in broadcasting as well as language that is obscene and indecent, when used in broadcasting, speaking as follows in the case of *Duncan v. United States*, 48 Fed. (2d) 128: "The appellant was accused in that count of knowingly, unlawfully, wilfully, and feloniously uttering obscene, indecent, and profane language by means of radio communication and by interstate radio transmission from his radio broadcasting station known as KVEP situated in Portland, within the state and district of Oregon. * * * The test is as to whether or not the language to be obscene would arouse lewd or lascivious thought in the minds of those hearing or reading the publication. * * * It is manifest from the foregoing that the language used, while extremely abusive and objectionable, has no tendency to excite

libidinous thoughts on the part of the hearers. * * * We must conclude that the language used is not covered by the statutory prohibition against the use of obscene and indecent language. We will now consider whether or not the language is profane. * * * Under these decisions, the indictment having alleged that the language is profane, the defendant having referred to an individual as 'damned,' having used the expression 'By God' irreverently, and having announced his intention to call down the curse of God upon certain individuals, was properly convicted of using profane language within the meaning of that term as used in the act of congress prohibiting the use of profane language in radio broadcasting."

§ 704c. **Hearings of commission—Notice—Appeals.**—Where an appeal from the decision of the radio commission was properly taken, and it appeared that the commission failed to notify or grant a hearing to a station of a proposed change of frequency, which the commission ordered, the court reversed the action of the commission, because the statute provides for such a notice and hearing. In the course of its opinion, sustaining the right to a notice and hearing, the court spoke in part as follows in the case of *Courier-Journal Co. v. Federal Radio Comm.*, 46 Fed. (2d) 614: "The appellants are the owners of a radio broadcasting station located at Louisville, Ky., and answering to the call signal WHAS. The station was regularly licensed by the federal radio commission for the period of ninety days ending April 30, 1930, to operate on a frequency of 820 kilocycles, cleared channel, with a power output of ten kilowatts, without limitation of time. * * * On April 21, 1930, the appellants filed an appeal in this court under authority of section 16 of the Radio Act of 1927, 44 Stat. 1162, 1169 (47 USCA, section 96), based in part upon the ground that the commission had failed to give them notice or grant them a hearing of the proposed change of frequency, prior to the date when it was to become effective. In our opinion, this complaint is sustained by the facts above recited, to wit, that under the commission's order the change in frequency was to become effective on April 30, 1930, whereas no hearing was provided for until June 17, 1930. In the meantime, the station would be deprived of the frequency for which it was contending without an opportunity to be heard. This was error. * * * The orders appealed from are reversed, and the commission is ordered to renew appellants' license from time to time to operate as heretofore upon the frequency of 820 kilocycles until such time as it may be deter-

mined as the result of a hearing after due notice upon issues clearly defined that such continued operation is not in the public interest, convenience, or necessity."

In a later case, this same court reiterated the principle providing that notice and a hearing must be given before a decision affecting any station is rendered by the commission, because this would be in violation of the statute creating the commission, which is the source and extent of its authority; for as the court said in the case of *Westinghouse Elec. & Mfg. Co. v. Federal Radio Comm.*, 47 Fed. (2d) 415: "But in lieu thereof the commission granted to appellant a license containing the qualification * * * set out; and that this was done without granting a hearing to appellant concerning the qualification or giving appellant an opportunity to be heard thereon, and contrary to the public interest, convenience, and necessity. * * * There are various questions raised by these appeals, but we think that their present disposition plainly follows from a single principle heretofore stated by this court in deciding the appeal of *Courier-Journal Company v. Federal Radio Commission*, 60 App. D. C. 33, 46 Fed. (2d) 614, handed down on the sixth of January, 1931. That case related to the identical action of the commission complained of in the present appeal, No. 5192. In that case the order of the commission was reversed because of its failure to give prior notice to the station affected by the proposed change, in order to permit of a hearing in relation thereto. See, also, *Charles McK. Saltzman et al. v. Stromberg-Carlson Telephone Mfg. Co.*, 60 App. D. C. 31, 46 Fed. (2d) 612, decided by this court January 6, 1931. In accordance with the ruling in that case we reverse the orders complained of in these four appeals, and the commission is ordered to renew appellant's license from time to time to operate upon the frequency of 1,020 kilocycles without the qualification in question, until such time as it may be determined as the result of a hearing after due notice upon issues clearly defined that such continued operation is not in the public interest, convenience, or necessity. And these causes are remanded accordingly."

A radio station, which is well equipped and has rendered service of a high character for a number of years, is entitled to be heard and its interests considered before the radio commission permits changes in other stations which affect the service of the station in question, not only in justice to the station itself, but in the interest of the public generally; and such action will not be sustained by the courts, because of its unfairness in arbi-

trarily permitting changes in other stations without giving proper consideration and an opportunity after due notice to the station under consideration to participate in the hearing. This principle is established and discussed as follows in the case of *Journal Co. v. Federal Radio Comm.*, 48 Fed. (2d) 461, where the court said in part: "Appellant, a Wisconsin corporation, is the publisher of the Milwaukee Journal, a leading newspaper in Wisconsin. It is the owner and operator of broadcasting station WTMJ at Milwaukee, which operates full time on a frequency of 620 kilocycles, with authorized use of 1,000 watts power nighttime, and 2,500 watts daytime. This station and its predecessors in interest have been operating since 1922, under licenses from the secretary of commerce and later under licenses from the radio commission. The station represents an investment of over \$300,000. More than \$160,000 has been expended for major station equipment alone. The total gross cost of operating the station is approximately \$300,000 per annum, the greater portion of which being for program expenses. It has forty-eight full-time employees, including an operating staff of ten skilful technicians, a musical director who devotes all his time to the station's programs, an organist, and a permanent sixteen-piece orchestra. The pay roll for the year 1929 was \$122,796.62. The evidence clearly established (indeed, there is no suggestion to the contrary) that appellant's equipment is modern and satisfactory in every way and that its service has been of a very superior character. * * * Appellant was prejudiced, not by a refusal to renew its application, but by the commission's action with respect to other stations. * * * Where a broadcasting station has been constructed and maintained in good faith, it is in the interests of the public and common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons. *Chicago Fed. of Labor v. Fed. Radio Comm.*, 59 App. D. C. 333, 41 Fed. (2d) 422. Unless such a policy is maintained, the public will not receive the character of service which we are convinced the Radio Act was intended to insure. No station that has been operated in good faith should be subjected to a change of frequency or power or to a reduction of its normal and established service area, except for compelling reasons. After the commission had increased the power of the Maine station and shifted the Florida stations, appellant, apparently being doubtful of its right of appeal in No. 5095, filed its application in No. 5163 seeking a modification of its existing license so as to permit the operation of its station with 5,000

watts power, full time, on the same frequency, 620 kc. This application was refused, the commission being of the view that to increase the power of appellant's station from its then assignment of 1,000 watts to 5,000 watts would ruin reception of all the other stations on the frequency. As already observed, appellant's station had already suffered similar harm by the action of the commission with respect to such other stations on the same frequency; moreover, this action was taken without notice to appellant. * * * In our view, it clearly appears that appellant is entitled to some form of relief. The commission was in error as a matter of law in increasing the power of the Maine station and shifting the Florida stations without notice to appellant and an opportunity for appellant to be heard. *Courier-Journal Co. v. Fed. Radio Comm.*, — App. D. C. —, 46 Fed. (2d) 614, decided this term. The finding of the commission in No. 5163 that there are 'four stations besides appellant's assigned to the frequency of 620 kilocycles, whose geographical separation permit simultaneous operation without intolerable interference' is 'manifestly against the evidence.' "

While the Federal Radio Act provides for redress against an arbitrary or unreasonable action by the commission, the court will refuse to consider the rights of a radio station which fails to avail itself of the right of appeal expressly provided for in the Federal Radio Act, as is indicated in the case of *White v. Johnson*, 282 U. S. 367, 75 L. ed. 388, 51 Sup. Ct. 115, where the court said: "We have * * * called attention to the provisions of the Radio Act which give redress against arbitrary or unjust action by the commission. We repeat that the appellant did not see fit to avail himself of the right of appeal thereby conferred, but on the contrary chose to violate the commission's order and to stand on an alleged constitutional right which he says the action of the commission infringed. It would be subversive of all established principles were courts, in litigations between parties who have reciprocal rights under the constitution, to settle their controversies by broad statements to the effect that acts of congress are unconstitutional upon their face; and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law."